Supreme Court, U. S.
FILED
APR 22 1974
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1573

HAROLD WITHROW, D.O.;
THOMAS HENNEY, M.D.;
A. J. SANFELIPPO, M.D.;
JOHN M. IRVIN, M.D.;
J. W. RUPEL, M.D.;
A. L. FREEDMAN, M.D.;
MARK T. O'MEARA, M.D.;
THOMAS W. TORMEY, JR., M.D.;
individually and as members of
the Medical Examining Board of
the State of Wisconsin,
*Appellants,*

*v.*

DUANE LARKIN, M.D.,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

## JURISDICTIONAL STATEMENT

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April 18, 1974

## INDEX AND SYNOPSIS OF ARGUMENT

*Page*

OPINIONS BELOW ..... 2

JURISDICTION ..... 2

WISCONSIN STATUTES INVOLVED ..... 3

QUESTIONS PRESENTED ..... 3

STATEMENT OF THE CASE ..... 4

THE QUESTIONS PRESENTED ARE SUBSTANTIAL, IMPORTANT, AND REVIEW AND ACTION BY THIS COURT IS REQUIRED ..... 10

**I. The Decision Below Is Contrary To Decisions Of This Court In All Material Respects** ..... 10

*A. The declaration that a state statute is unconstitutional in deciding a mere motion for a preliminary injunction is, as stated by this Court, "serious error" and requires reversal of the judgment* ..... 10

*B. The lower court decision that it is a violation of due process for an administrative agency to possess and exercise both investigative and adjudicative functions is contrary to the decisions of this Court* ..... 12

1. This Court has held that the mixing of such functions in an administrative agency is not a violation of due process ..... 12

*Page*

2. The decision of the lower court misconstrues and misapplies certain decisions of this Court ..... 16

*C. The decision granting a preliminary injunction in this case is contrary to the decisions of this Court and, if any discretion to grant the motion arose, doing so constituted an abuse of discretion* ..... 20

1. All applicable decisions of this Court were disregarded and violated by the decision of the lower court ..... 20

2. If the lower court here possessed any discretion to grant the motion, its decision is an abuse of discretion ..... 24

**II. The Decision Of The Lower Court Is The Result Of Such A Departure From The Accepted And Usual Course Of Judicial Proceedings That This Court Should Exercise Its Power Of Supervision Over Lower Federal Courts And Take Appropriate Action** ..... 27

**III. The Effect Of The Decision Below Is Widespread And Undesirable** ..... 32

CONCLUSION ..... 34

CASES CITED

Alabama Public Service Com'n v. Southern Ry. Co. (1951), 341 U.S. 363, 71 S.Ct. 775, 95 L.Ed. 1016 ..... 20



*Page*

Amos Treat & Co. v. Securities and Exchange Commission (D.C. Cir. 1962), 306 F. 2d 260 ..... 16

Askew v. Hargrave (1971), 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed. 2d 196 ..... 28

Beacon Theatres, Inc. v. Westover (1959), 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988 ..... 20, 21

Cameron v. Johnson (1968), 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed. 2d 182 ..... 21

Duke v. North Texas State University (5th Cir. 1973), 469 F. 2d 829, cert. den. — U.S. —, 93 S.Ct. 2760, 37 L.Ed. 2d 160 ..... 16

Ex Parte Fahey (1947), 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041 ..... 20

Federal Trade Comm. v. A. McLean & Son (7th Cir. 1936), 84 F. 2d 910 ..... 16

Federal Trade Comm. v. Cement Institute (1948), 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010, reh. den. 334 U.S. 839, 68 S.Ct. 1492, 92 L.Ed. 1764 ..... 13

Federal Trade Comm. v. Cinderella Career and Finishing Schools, Inc. (D.C. Cir. 1968), 404 F. 2d 1308 ..... 16

Gagnon v. Scarpelli (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 ..... 16, 17, 18, 19

*Page*

Geiger v. Jenkins (N.D. Ga. 1970),
316 F.Supp. 370 ..... 29

Geiger v. Jenkins (1971),
401 U.S. 985, 91 S.Ct. 1236,
28 L.Ed. 2d 525 ..... 29

Gibbs v. Buck (1939),
307 U.S. 66, 59 S.Ct. 725,
83 L.Ed. 1111 ..... 21

Gibson v. Berryhill (1973),
411 U.S. 564, 93 S.Ct. 1689,
36 L.Ed. 2d 488 ..... 12, 15, 21, 28

Goldberg v. Kelly (1970),
397 U.S. 254, 90 S.Ct. 1011,
25 L.Ed. 2d 287 ..... 17, 18, 19

Goldstein v. Cox (1970),
396 U.S. 471, 90 S.Ct. 671,
24 L.Ed. 2d 663 ..... 2

Hatahley v. United States (1956),
351 U.S. 173, 76 S.Ct. 745,
100 L.Ed. 1065 ..... 25

Hecht Company v. Bowles (1944),
321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 ..... 22

Henneford v. Northern Pac. Ry. Co. (1938),
303 U.S. 17, 58 S.Ct. 415, 82 L.Ed. 619 ..... 20

Illinois Commerce Commission v. Thomson
(1943), 318 U.S. 675, 63 S.Ct. 834,
87 L.Ed. 1075 ..... 22

Intercontinental Indus. Inc. v. American
Stock Exch. (5th Cir. 1971), 452 F. 2d 935 ..... 16



*Page*

Kelley v. Everglades Drainage District (1943),
319 U.S. 415, 63 S.Ct. 1141, 87 L.Ed. 1485 ..... 25

Larkin v. Withrow (E.D. Wis. 1973),
368 F.Supp. 793 ..... 2

Larkin v. Withrow (E.D. Wis. 1973),
368 F.Supp. 796 ..... 2

Mack v. Florida State Board of Dentistry
(5th Cir. 1970), 430 F. 2d 862 ..... 16

Marcello v. Bonds (1955),
349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 ..... 15, 33

Massachusetts State Grange v. Benton (1926),
272 U.S. 525, 42 S.Ct. 189, 71 L.Ed. 387 ..... 21

Mayo v. Lakeland Highlands Canning Co.
(1940), 309 U.S. 310, 60 S.Ct. 517,
84 L.Ed. 774 ..... 11, 21, 25, 30

Mitchum v. Foster (1972),
407 U.S. 225, 92 S.Ct. 2151,
32 L.Ed. 2d 705 ..... 28

Moody v. Flowers (1967),
387 U.S. 97, 87 S.Ct. 1544,
18 L.Ed. 2d 643 ..... 28

Morrissey v. Brewer (1972),
408 U.S. 471, 92 S.Ct. 2593,
33 L.Ed. 2d 484 ..... 17, 18, 19

National Labor Relations Bd. v. Donnelly
Garment Co. (1947), 330 U.S. 219,
67 S.Ct. 756, 91 L.Ed. 854 ..... 15

Ohio Oil Co. v. Conway (1929),
279 U.S. 813, 49 S.Ct. 256,
73 L.Ed. 972 ..... 21

*Page*

Pangburn v. C.A.B. (1st Cir. 1962),
311 F. 2d 349 ..... 16

Pennsylvania v. Williams (1935),
294 U.S. 176, 55 S.Ct. 380,
79 L.Ed. 841 ..... 22

Railroad Commission of California v. Pacific
Gas and Electric Co. (1938), 302 U.S. 388,
58 S.Ct. 334, 82 L.Ed. 319 ..... 22

Richardson v. Perales (1971),
402 U.S. 389, 91 S.Ct. 1420,
28 L.Ed. 2d 842 ..... 14, 32

Sampson v. Murray (1974),
— U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166 ..... 21, 23, 25

Schmidt v. Lessard (1974),
— U.S. —, 94 S.Ct. 713, 38 L.Ed. 2d 661 ..... 2, 27

Semler v. Oregon State Board of Dental
Examiners (1935), 294 U.S. 608,
55 S.Ct. 570, 79 L.Ed. 1086 ..... 29

State Corp. Commission v. Wichita Gas Co.
(1934), 290 U.S. 561, 54 S.Ct. 321,
78 L.Ed. 500 ..... 21

Terrace v. Thompson (1923),
263 U.S. 197, 44 S.Ct. 15,
68 L.Ed. 2d 255 ..... 20, 21

Toomer v. Witsell (1948),
334 U.S. 385, 68 S.Ct. 1156,
92 L.Ed. 1460 ..... 20, 21



*Page*

Trans World Airlines v. Civil Aeronautics
Board (D.C. Cir. 1958), 254 F. 2d 90 ..... 16

Virginian Ry. Co. v. System Federation
(1937), 300 U.S. 515, 57 S.Ct. 592,
81 L.Ed. 789 ..... 22

Watson v. Buck (1941),
313 U.S. 387, 61 S.Ct. 962,
85 L.Ed. 1416 ..... 21

Wyman v. Rothstein (1970),
398 U.S. 275, 90 S.Ct. 1582,
26 L.Ed. 2d 218 ..... 2

Yakus v. United States (1944),
321 U.S. 414, 64 S.Ct. 660,
88 L.Ed. 834 ..... 22

Younger v. Harris (1971),
401 U.S. 37, 91 S.Ct. 746,
27 L.Ed. 2d 669 ..... 20, 21, 28

**UNITED STATES CONSTITUTION**

Fourteenth Amendment ..... 4

**UNITED STATES STATUTES AND RULES**

5 U.S.C. §554 (d) ..... 33

5 U.S.C. §554 (d) (2) ..... 33

5 U.S.C. §554 (d) (2) (C) ..... 34

28 U.S.C. §1253 ..... 2

28 U.S.C. §1343 ..... 2

28 U.S.C. §2201 ..... 2

*Page*

28 U.S.C. §2281 ..... 2, 28, 29

28 U.S.C. §2283 ..... 28

42 U.S.C. §1983 ..... 2

Federal Rules of Civil Procedure:

Rule 7 (b) ..... 10, 24, 29

Rule 52 (a) ..... 4, 9, 24, 25, 30

Rule 54 (a) ..... 30

Rule 57 ..... 29

Rule 58 ..... 30

Rule 65 (a) (2) ..... 11

Rule 65 (b) ..... 29

Rule 65 (d) ..... 27, 30

WISCONSIN STATUTES

Chapter 227 ..... 19, 25

Section 227.17 ..... 25

227.20 ..... 25

227.20 (2) ..... 25

Chapter 448 ..... 3

Section 448.17 ..... 3, 5, 6, 8, 10, 26

448.18 ..... 6, 8, 10



*Page*

Section 448.18 (1) ..... 5

448.18 (2) ..... 5

448.18 (3) ..... 5

448.18 (7) ..... 1,2,3,5,7,8,9,11,19,24,25,26,31

OTHER AUTHORITIES

43 C.J.S., Injunctions, §15 ..... 20

7 Moore's Federal Practice,

§65.04 [3] ..... 23

§65.18 [3] ..... 20

11 Wright and Miller,
Federal Practice and Procedure,

§2947 ..... 26

§2948 ..... 20

§2949 ..... 23

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individually and as members of
the Medical Examining Board of
the State of Wisconsin,
*Appellants,*

*v.*

DUANE LARKIN, M.D.,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

## JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Eastern District of Wisconsin, entered on January 31, 1974, and in which a three-judge court declared sec. 448.18 (7), Wis. Stats., unconstitutional and preliminarily enjoined the appellants from utilization of that subsection of the statutes. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

## OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin, consisting of the Honorable F. Ryan Duffy, Senior Circuit Judge, the Honorable John W. Reynolds, District Judge, and the Honorable Myron L. Gordon, District Judge, dated December 21, 1973, is reported at 368 F.Supp. 796. The opinion of the Honorable Myron L. Gordon, District Judge of the United States District Court for the Eastern District of Wisconsin, dated October 1, 1973, is reported at 368 F.Supp. 793. A copy of the opinion of the three-judge court is found in the appendix hereto (App. 2-4).

## JURISDICTION

This is an action for declaratory and injunctive relief brought under the Civil Rights Act, 42 U.S.C. §1983. Jurisdiction of the district court was invoked under 28 U.S.C. §1343, 2201, and 2281. A three-judge district court was convened and the judgment of that court, which declared sec. 448.18 (7), Wis. Stats., unconstitutional and preliminarily enjoined its utilization, was dated and entered on January 31, 1974. Notice of appeal therefrom was filed in that court on March 1, 1974. Copies of the judgment and notice of appeal are included in the appendix hereto (App. 4-7).

The jurisdiction of the Supreme Court to review this decision of a three-judge court by direct appeal is conferred by 28 U.S.C. §1253. Cases sustaining the jurisdiction of the Supreme Court to hear this appeal include *Goldstein v. Cox* (1970), 396 U.S. 471, 90 S.Ct. 671, 24 L.Ed. 2d 663, *Wyman v. Rothstein* (1970), 398 U.S. 275, 90 S.Ct. 1582, 26 L.Ed. 2d 218, and *Schmidt v. Lessard* (1974), — U.S. —, 94 S.Ct. 713, 38 L.Ed. 2d 661.



## WISCONSIN STATUTES INVOLVED

### Chapter 448 — Medical Examining Board

448.17 Investigation; hearing. The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under s. 448.06, that are inimical to the public health. The examining board shall have the power to warn and to reprimand, when it finds such practice, and to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute, and the attorney general may aid the district attorney in the prosecution thereof.

448.18 Revocation. * * *

* * *

(7) A license or certificate of registration may be temporarily suspended by the examining board, without formal proceedings, and its holder placed on probation for a period not to exceed 3 months where he is known or the examining board has good cause to believe that such holder has violated sub. (1). The examining board shall not have authority to suspend a license or certificate of registration, or to place a holder on probation, for more than 2 consecutive 3-month periods. *All examining board actions under this subsection shall be subject to review under ch. 227.* [Emphasis added.]

## QUESTIONS PRESENTED

1. Can a district court in deciding a mere motion for a preliminary injunction declare a state statute unconstitutional and preliminarily enjoin *all* utilization of the statute?

2. In the absence of disqualification because of actual bias or personal interest, is it a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution for the members of a state administrative board or agency to possess and exercise both the power to investigate and the power to adjudicate?

3. When the movant for a preliminary injunction to enjoin the enforcement and operation of a state statute presents to the district court an inadequate motion and ABSOLUTELY NO EVIDENCE establishing or even attempting to establish ANY of the following: a) lack of an adequate remedy at law, b) exhaustion of his administrative remedies, c) a reasonable probability of success on the merits, d) irreparable and certain injury if the requested relief is not granted, and e) lack of undue harm to the public interest, and the district court makes no Findings of Fact and Conclusions of Law as required by Rule 52 (a), FRCP, does the district court have power to grant such injunctive relief and, if so, does such action constitute an abuse of discretion?

4. Should the district court have abstained from interfering with this state administrative proceeding?

## STATEMENT OF THE CASE

The appellee, hereinafter referred to as Dr. Larkin, is a resident of the State of Michigan and is licensed to practice medicine in that state. He, on the basis of the medical licensing reciprocity agreement between the states of Michigan and Wisconsin, applied for and in August, 1971, was granted a license to practice medicine and surgery in the State of Wisconsin by the appellants, who are members of the Medical Examining Board and are hereinafter referred to as members of the Board.



The Medical Examining Board is the state administrative agency which issues licenses to practice medicine in Wisconsin. It also, under the provisions of sec. 448.17, Wis. Stats., has authority to investigate practices inimical to public health and can warn or reprimand a licensee if it finds that the licensee is engaged in such practices. If its investigation discloses probable cause for doing so, it may also complain to a district attorney and seek the institution of an appropriate criminal prosecution or of a civil action to revoke the license of the licensee.

The Board has no power to revoke or suspend a license, except under the here inapplicable provisions of sec. 448.18 (3), Wis. Stats., and under the here applicable provisions of sec. 448.18 (7), Wis. Stats. The latter authorizes the Board to temporarily suspend a license for not to exceed three months if it has good cause to believe that a licensee is engaged in immoral or unprofessional conduct as defined in sec. 448.18 (1), Wis. Stats. Revocation and other than temporary suspension of a medical license can be accomplished only after a successful court action brought by a district attorney. Sec. 448.18 (2) and (3), Wis. Stats.

Dr. Larkin, after receiving his Wisconsin license in August, 1971, immediately rented offices in Milwaukee, Wisconsin, and, as subsequently learned, did so under the alias, Glen Johnson. He specialized in the performance of abortions and commuted between Detroit and Milwaukee. He initially spent Fridays, Saturdays, and Sundays performing abortions in Milwaukee. After February, 1973, however, he came to Milwaukee on only very infrequent occasions and practically all abortions were performed by an associate, who received a percentage of the gross fee per abortion.

On June 20, 1973, the Medical Examining Board issued and mailed to Dr. Larkin a Notice of Investigative Hearing to be held at a designated time and place on July 12, 1973. The subject of the investigation was stated therein and Dr. Larkin, either with or without counsel, was invited to attend the ex parte investigative hearing, which was to be held under the authority granted to the Board by sec. 448.17, Wis. Stats.

Dr. Larkin, on July 6, 1973, filed a civil rights action against the members of the Board in the United States District Court for the Eastern District of Wisconsin. In such action he sought a permanent injunction, a preliminary injunction, and a temporary restraining order enjoining the members of the Board from investigating or holding any kind of hearing on his medical practices. The motion for a temporary restraining order was denied and the court established a briefing schedule on the motion for a preliminary injunction.

On July 12, 1973, the members of the Board filed a motion to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted. Larkin, on the same day, filed an unverified amended complaint, a new motion for a temporary restraining order and preliminary injunction, and a motion to convene a three-judge court. The amended complaint added a request for declaratory judgment and, in addition to injunctive relief against the investigative hearing, sought a declaration that sec. 448.17 and sec. 448.18, Wis. Stats., were unconstitutional.

The investigative hearing was held by the Board on July 12 and 13, 1973. Numerous witnesses testified under oath, and the attorney for Dr. Larkin was present throughout the proceedings. The hearing was then adjourned to a future date.



Dr. Larkin was subsequently informed in writing, through his attorney, that if he wished, he could appear before the Board and explain any of the evidence which had been presented to it during its investigation.

On July 18, 1973, the district court denied a renewed motion for a temporary restraining order and thereafter the members of the Board filed a motion to dismiss the amended complaint.

On September 18, 1973, and under the authority granted to it by sec. 448.18 (7), Wis. Stats., the Board issued the following Notice of Contested Hearing to Dr. Larkin:

> "TAKE NOTICE that a contested hearing will be held on the Board's own motion on October 4, 1973 * * * to determine whether the licensee has practiced medicine in the State of Wisconsin under any other Christian or given name or any other surname than that under which he was originally licensed or registered to practice medicine in this state, which practicing has operated to unfairly compete with another practitioner, to mislead the public as to identity, or to otherwise result in detriment to the profession or the public, and more particularly, whether the said Duane Larkin, M.D., has practiced medicine in this state since September 1, 1971, under the name of Glen Johnson.
>
> "TAKE FURTHER NOTICE that the Board will also hear evidence to determine whether the licensee has permitted persons to practice medicine in this state in violation of sec. 448.02 (1), Stats., more particularly whether the said Duane Larkin, M.D., permitted Young Wahn Ahn, M.D., an unlicensed physician, to perform abortions at his abortion clinic during the year 1972.
>
> "TAKE FURTHER NOTICE that the Board will also hear evidence to determine whether the said Duane Larkin, M.D., split fees with other persons during the years 1971, 1972, and 1973 in violation of sec. 448.23 (1), Stats.

"Based on the evidence adduced at said contested hearing, the Medical Examining Board will determine whether to suspend the license of the said Duane Larkin, M.D., under the authority of sec. 448.18 (7), Stats."

On October 1, 1973, and in the absence of any hearing thereon, the district court, after being informed by affidavit of Dr. Larkin's attorney of his receipt of the above notice, issued a decision and order in which it granted Larkin's motion to convene a three-judge court and granted a motion for a temporary restraining order enjoining the members of the Board from proceeding with the contested hearing under sec. 448.18 (7), Wis. Stats., and from enforcing the provisions of that section of the statutes against Dr. Larkin. It also denied the motion of the members of the Board to dismiss the amended complaint.

The Board, on October 4, 1973, heard some additional witnesses and concluded its investigative hearing. Dr. Larkin did not appear, although his attorney did address the Board. Thereafter the Board issued its investigative findings of fact, conclusions of law, and decision.

A three-judge court was appointed. The members of the Board filed an answer to the amended complaint, in which they denied all material allegations other than those identifying the parties and alleging that a notice of investigative hearing had been issued by the Board. There was no consolidation of trial on the merits with the hearing on the motion for a preliminary injunction.

Neither the three-judge court nor the single judge held any evidentiary hearing on the motion for a preliminary injunction or on Dr. Larkin's allegation that sec. 448.17 and sec. 448.18, Wis. Stats., were unconstitutional. Absolutely no evidence in any form was presented in support of the claim of Dr. Larkin that these two sections of the Wisconsin statutes were



unconstitutional. The only support for the motion for preliminary injunction were affidavits of Larkin's counsel, which affidavits merely placed in the record certain newspaper articles, a copy of a letter from the attorney for the Board to Larkin's attorney, a copy of the Board's notice of contested hearing, the attorney's version of the evidence presented at the investigative hearing, and a copy of the Board's findings of fact, conclusions of law, and decision made upon completion of its investigative hearing.

The three-judge court heard arguments on the motion for a preliminary injunction on November 19, 1973. On that same date it orally declared that sec. 448.18 (7), Wis. Stats., was unconstitutional on the ground, as subsequently explained in its written decision, that:

"* * * for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as §448.18 (7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decision-maker, we concluded that it was unconstitutional and unenforceable." (App. 2, 3.)

It, further, and in the complete absence of any evidence from or even allegations by Dr. Larkin that he had no adequate remedy at law, that he had exhausted his administrative remedies, that there was a reasonable probability of success on the merits, that he would suffer irreparable and certain harm if the relief was not granted, and that granting such relief would not cause undue harm to the public interest, granted the motion for a preliminary injunction enjoining the members of the Board from utilizing sec. 448.18 (7), Wis. Stats. It made and filed no findings of fact and conclusions of law as required by Rule 52 (a), FRCP.

On December 21, 1973, the decision of the three-judge court was filed. Thereafter, on January 31, 1974, the court did enter a judgment. The members of the Medical Examining Board have appealed to this Court from that judgment.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL, IMPORTANT, AND REVIEW AND ACTION BY THIS COURT IS REQUIRED.

### I. The Decision Below Is Contrary To Decisions Of This Court In All Material Respects.

*A. The declaration that a state statute is unconstitutional in deciding a mere motion for a preliminary injunction is, as stated by this Court, "serious error" and requires reversal of the judgment.*

Dr. Larkin's unverified amended complaint contains allegations that sec. 448.17 and sec. 448.18, Wis. Stats., were unconstitutional in certain specified respects. Larkin sought as ultimate relief in his action a declaration to this effect and a permanent injunction. He also made motions for a preliminary injunction, which motions failed to comply with the requirement of Rule 7 (b), FRCP, that a motion "shall state with particularity the grounds therefor." *No* grounds for granting any of Larkin's various motions for a preliminary injunction were stated therein.

There was no evidentiary hearing on the motion and absolutely no affidavits or other evidence were presented by Dr. Larkin to the three-judge court setting forth facts in support of the allegations in his amended complaint that the sections of the Wisconsin statutes in question were unconstitutional. There was no consolidation of the hearing on the



motion for a preliminary injunction with trial on the merits as can be done under the provisions of Rule 65 (a) (2), FRCP. The hearing consisted solely of oral argument on the groundless motion.

Despite this, the three-judge court declared in its decision granting the motion for a preliminary injunction that sec. 448.18 (7), Wis. Stats., is unconstitutional. (App. 4.) Its judgment granting the preliminary injunction reads:

> "It is Ordered and Adjudged that *§448.18 (7), Wis. Stats., is unconstitutional* and that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats." (App. 5.) (Emphasis added.)

A three-judge court on a mere motion for a preliminary injunction cannot declare a state statute unconstitutional. This Court unanimously so held in *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774. In reversing the judgment therein, this Court, after pointing out that the lower court had declared a state statute unconstitutional, wrote (309 U.S. at 316):

> "We think the court committed *serious error* in thus dealing with the case upon motion for temporary injunction. *The question before it was not whether the act was constitutional or unconstitutional*; was not whether the Commission had complied with the requirements of the act, if valid, *but was whether the showing made raised serious questions, under the Federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants."* (Emphasis added.)

A state statute, as well as a federal statute, is presumed to be constitutional. As pointed out in *Mayo* at pages 318 and 319, a mere allegation of unconstitutionality contained in

an unverified complaint does not even raise a substantial question. Unless the *evidence* presented at a hearing supports findings of fact and a conclusion of law that there is a substantial federal question involved, the mere presumption of constitutionality "would require the denial of a temporary injunction." Here there was no evidence at all.

The lower court's serious error in declaring a state statute unconstitutional in deciding a mere inadequate and groundless motion for a preliminary injunction, in support of which absolutely no evidence was presented, requires reversal of this judgment. This reversal error, however, is only one of many which resulted from the lower court's disregard of the applicable decisions of this Court.

### *B. The lower court decision that it is a violation of due process for an administrative agency to possess and exercise both investigative and adjudicative functions is contrary to the decisions of this Court.*

1. This Court has held that the mixing of such functions in an administrative agency is not a violation of due process.

The lower court decided that because the members of the Board had investigated Dr. Larkin's medical practices, they could not, consistent with due process, hold a contested hearing and adjudicate the question of whether or not the Board should temporarily suspend Dr. Larkin's license to practice medicine. (App. 2, 3.) This is *not* a case, as in *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488,



where the lower court found that the members of the Board were disqualified by reason of bias or personal pecuniary interest in the outcome. The decision here was that the mere existence in and exercise of both investigative and adjudicative functions by the same administrative agency is a violation of due process. The lower court's decision is completely unsupported by any authority, legal or logical, and it is, in fact, contrary to the applicable decisions of this Court.

In *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010, reh. den. 334 U.S. 839, 68 S.Ct. 1492, 92 L.Ed. 1764, this Court found that members of the Federal Trade Commission, who on the basis of prior official investigations by them had concluded and publicly expressed the opinion that a certain cement industry trade practice was illegal, properly refused to disqualify themselves from hearing and passing on the same practice in a contested proceeding to determine whether a cease and desist order should issue. In so concluding, this Court discussed the difference between an ex parte investigation and a contested hearing and also discussed the rule of necessity, both of which discussions are also applicable to the present case.

In addition to the disqualification question, the claim was made in the above-cited case that it was a violation of due process for the members of the Federal Trade Commission to adjudicate, after having conducted an ex parte investigation and having determined that the involved practice was illegal. This Court also rejected that argument and wrote (333 U.S. at 702, 703):

> "Marquette also seems to argue that it was a denial of due process for the Commission to act in these proceedings after having expressed the view that industry-wide use of the basing point system was illegal. A number

of cases are cited as giving support to this contention. Tumey v. Ohio, 273 U.jS. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243, is among them. But it provides no support for the contention. In that case Tumey had been convicted of a criminal offense, fined, and committed to jail by a judge who had a direct, personal, substantial, pecuniary interest in reaching his conclusion to convict. A criminal conviction by such a tribunal was held to violate procedural due process. But the Court there pointed out that most matters relating to judicial disqualification did not rise to a constitutional level. Id., at page 523 of 273 U.S., at page 441 of 47 S.Ct., 71 L.Ed. 749, 50 A.L.R. 1243.

"Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed on opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court."

More recently, in *Richardson v. Perales* (1971), 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842, this Court also rejected a comparable claim. It was argued to this Court that there was a denial of due process because the hearing examiner who heard and decided the case was not "an independent hearing examiner" in that he also had responsibility for gathering the evidence. This Court wrote (402 U.S. at 410):

"Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. *He acts as an examiner charged with developing the facts.* The 44.2% reversal rate for all federal disability hearings in cases where the state agency does not grant benefits * * * attests to the fairness of the system and refutes the implication of impropriety." (Emphasis added.)



"Developing the facts" is an investigative function and, therefore, this decision also is that combining investigative and adjudicative functions in a hearing examiner, let alone in a whole administrative agency, is not a denial of procedural due process. See also *National Labor Relations Bd. v. Donnelly Garment Co.* (1947), 330 U.S. 219, 226, 227, 67 S.Ct. 756, 91 L.Ed. 854, in which this Court held that no "legal requirements" had been violated because the Board refused a request for a new examiner to conduct a second hearing after the Board had assigned that hearing to the same examiner who had erred in his rulings and decision during the first hearing.

This Court has also held in a number of deportation cases, including *Marcello v. Bonds* (1955), 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107, that the right to due process was not violated because the Immigration Service has investigative, prosecutorial, and adjudicative functions and because a special inquiry officer, who exercised the adjudicative function, was subject to supervision and control by officials having investigative and prosecutorial functions.

There are some striking similarities, as well as glaring dissimilarities, between this appeal and that in *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488. In that case, this Court on the basis of considerations of equity, comity, and federalism vacated the judgment of a three-judge court in which that lower court had enjoined the members of the Alabama Optometry Board from conducting hearings on license revocation and from revoking the licenses of certain

corporation-employed optometrists. This Court, however, affirmed the determination of the lower court that, under the unique facts of the case, the members of the Board were disqualified from proceeding with the hearings because of bias based on substantial pecuniary interest in the outcome of the proceedings. This Court, therein, carefully noted, at 93 S.Ct. 1698 and footnote 17, that it did not reach and was not deciding the here involved question of the extent to which an administrative agency may investigate and then, consistent with due process, sit as an adjudicative body.

The decisions of this Court, as illustrated above, are that it is not a violation of due process for an administrative agency to possess and exercise both investigative and adjudicative functions. The decision of the lower court herein to that effect is clearly contrary to all applicable decisions of this Court. It is also contrary to all applicable decisions of the courts of appeal./[1]

2. The decision of the lower court misconstrues and misapplies certain decisions of this Court.

The decision of the lower court cites *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656,

1. See, for example, *Pangburn v. C.A.B.* (1st Cir. 1962), 311 F. 2d 349; *Intercontinental Indus. Inc. v. American Stock Exch.* (5th Cir. 1971), 452 F. 2d 935; *Duke v. North Texas State University* (5th Cir. 1973), 469 F. 2d 829, cert. den. — U.S. —, 93 S.Ct. 2760, 37 L.Ed. 2d 160; *Mack v. Florida State Board of Dentistry* (5th Cir. 1970), 430 F. 2d 862; *Federal Trade Comm. v. A. McLean & Son* (7th Cir. 1936), 84 F. 2d 910; *Federal Trade Comm. v. Cinderella Career and Finishing Schools, Inc.* (D.C. Cir. 1968), 404 F. 2d 1308; et al. This is *not* a case involving the possible disqualification of an individual board member, who prior to appointment to the board, was an agency employe involved in the case in an adversary capacity as in *Trans World Airlines v. Civil Aeronautics Board* (D.C. Cir. 1958), 254 F. 2d 90, and *Amos Treat & Co. v. Securities and Exchange Commission* (D.C. Cir. 1962), 306 F. 2d 260.



and *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484, which deal with parole and probation revocation, for the proposition that one of the elements of minimal due process is an "independent decisionmaker." It, then, inappropriately applied these cases to the present situation and determined that:

> "* * * The state medical examining board does not qualify as such a decisionmaker. It cannot properly rule with regard to the merits of the same charges it *investigated* * * *." (App. 3, 4.) (Emphasis added.)

There is absolutely nothing in *Gagnon, Morrissey,* or *Goldberg v. Kelly* (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287, which involved termination of welfare benefits, which supports this determination by the lower court. These cases neither indicate that an administrative agency, such as the Medical Examining Board, cannot qualify as an independent decisionmaker nor do they have anything to say on the subject of the possession and exercise of both investigative and adjudicative functions by an administrative agency. They deal with *review of the decision* of an agency by the same agency, i.e., performing an adjudicative function to determine the correctness of its own prior adjudication.

These cases stand for the proposition that review of the decision or recommendation of agency personnel to terminate welfare benefits or to revoke parole or probation must be conducted by some person within the agency other than the initial decisionmaker. This is made clear in *Goldberg* when this Court wrote (397 U.S. at 271):

> "* * * And, of course, an impartial decision maker is essential. * * * We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision

maker. *He should not, however, have participated in making the determination under review.*" (Emphasis added.)

In *Morrissey* this Court further explained (408 U.S. at 486) that:

"* * * *The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them.* Goldberg v. Kelly found it unnecessary to impugn the motives of the caseworker to find a need for *an independent decisionmaker to examine the initial decision.*

"This independent officer need not be a judicial officer. The granting and revocation of parole are matters traditionally handled by administrative officers. In Goldberg, the Court pointedly did not require that the hearing on termination of benefits be conducted by a judicial officer or even before the traditional 'neutral and detached' officer; it required only that the hearing be conducted by some person *other* than one initially dealing with the case. * * *" (Emphasis added.)

What *Goldberg, Morrissey,* and *Gagnon* mandate in the present case is that IF the members of the Board had made a determination that the medical license of Dr. Larkin should be temporarily suspended,/[2] the members of the Board could not, consistent with minimal due process requirements, review the correctness of its own decision. Under these circumstances, the members of the Board would not be the required "independent decisionmaker" because they would be

2. The Board was enjoined from even *holding a hearing* on this question.



reviewing their own determination./[3] Of course, none of this happened in the present case.

Further, it would not have happened, since the very subsection of the Wisconsin statutes, which the lower court erroneously declared to be unconstitutional, requires review by an independent decisionmaker of any decision by the Board to temporarily suspend a license to practice medicine. Section 448.18 (7), Wis. Stats., concludes with the following provision:

"* * * All examining board actions under this subsection shall be subject to review under ch. 227."

Chapter 227, Wis. Stats., provides for judicial review of administrative agency decisions by the Circuit Court of Dane County, Wisconsin. A circuit judge is not only an "independent decisionmaker" as required by *Goldberg, Morrissey,* and *Gagnon,* but he is a "neutral and detached" judicial officer, which is specially not required. Dr. Larkin, therefore, would have received even more than minimal due process and the very subsection of the statutes improperly as well as erroneously declared by the lower court to be unconstitutional because it did not provide for an "independent decisionmaker," clearly and unequivocally provides even more than the required "independent decisionmaker."

3. On the basis of the holdings in *Goldberg, Morrissey,* and *Gagnon* is it a violation of due process for a district judge, who granted a motion for a temporary restraining order, to sit as a member of a three-judge district court to hear and adjudicate whether a motion for a preliminary injunction should be granted? Is he the required "independent decisionmaker" or is he actually reviewing the correctness of his own determination?

### C. *The decision granting a preliminary injunction in this case is contrary to the decisions of this Court and, if any discretion to grant the motion arose, doing so constituted an abuse of discretion.*

A preliminary or interlocutory injunction is an extraordinary equitable remedy. The power to issue such an injunction is subject to abuse and, therefore, it should be exercised with great caution and only when the reason and necessity therefor is clearly established by the moving party. In general, see 43 C.J.S., *Injunctions*, §15, p. 426; 7 *Moore's Federal Practice*, §65.18 [3], and 11 Wright and Miller, *Federal Practice and Procedure*, §2948, pp. 428, 429. In the present case, the three-judge court granted the motion and in doing so completely disregarded all applicable decisions of this Court.

#### 1. All applicable decisions of this Court were disregarded and violated by the decision of the lower court.

Various decisions of this Court have established or recognized the principles governing the availability of preliminary injunctive relief and the grounds for the granting of a motion therefor. An equitable remedy such as a preliminary injunction is not available when there is an adequate remedy at law./[4] Further, when, as here, state administrative proceedings are involved, which proceedings call into play administrative expertise, discretion, and fact finding, normally

4. *Terrace v. Thompson* (1923), 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Henneford v. Northern Pac. Ry. Co.* (1938), 303 U.S. 17, 58 S.Ct. 415, 82 L.Ed. 619; *Ex Parte Fahey* (1947), 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041; *Toomer v. Witsell* (1948), 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460; *Alabama Public Service Com'n. v. Southern Ry. Co.* (1951), 341 U.S. 363, 71 S.Ct. 775, 95 L.Ed. 1016; *Beacon Theatres, Inc. v. Westover* (1959), 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988; *Younger v. Harris* (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669; et al.



preliminary injunction is not available in the absence of exhaustion of administrative remedies. There are many decisions to this effect, and *contra*. See the discussion on this subject in *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488.

If there is no adequate remedy at law and there has been an exhaustion of administrative remedies, if required, the grounds for or factors to be considered in determining whether to grant a motion for preliminary injunction have been established by the decisions of this Court. First, there must be "irreparable," "grave," and "certain" injury to the movant if the requested relief is not granted./[5] Second, the question presented by the action must be "grave," "substantial," etc., i.e., there must be a reasonable probability or liklihood of success on the merits./[6] As stated in *Terrace v. Thompson* (1923), 263 U.S. 197, 214, 44 S.Ct. 15, 68 L.Ed. 255, however:

5. *Terrace v. Thompson* (1923), 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Massachusetts State Grange v. Benton* (1926), 272 U.S. 525, 47 S.Ct. 189, 71 L.Ed. 387; *Ohio Oil Co. v. Conway* (1929), 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972; *State Corp. Commission v. Wichita Gas Co.* (1934), 290 U.S. 561, 54 S.Ct. 321, 78 L.Ed. 500; *Gibbs v. Buck* (1939), 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111; *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774; *Watson v. Buck* (1941), 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416, *Toomer v. Witsell* (1948), 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460; *Beacon Theatres, Inc. v. Westover* (1959), 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988; *Cameron v. Johnson* (1968), 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed. 2d 182; *Younger v. Harris* (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669; *Sampson v. Murray* (1974), — U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166.

6. *Ohio Oil Co. v. Conway* (1929), 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972; *Massachusetts State Grange v. Benton* (1926), 272 U.S. 525, 42 S.Ct. 189, 71 L.Ed. 387; *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774; and many others.

"The unconstitutionality of a state law is not, of itself, ground for equitable relief in the courts of the United States. * * *"

Further, when, as here, injunction against the enforcement or operation of a state or federal statute is involved, the granting of the relief sought must not cause undue harm to the public interest./[7]

The party seeking injunctive relief has the burden of showing his eligibility for it and of establishing adequate grounds for the granting of his motion./[8] This burden and the decisions of this Court cited above mean that in the present case and before a preliminary injunction enjoining the enforcement and operation of a state statute could properly issue, Dr. Larkin had to prove to the Court or persuade it by proper evidence that:

a) he had no adequate remedy at law;

b) he had exhausted his administrative remedies;

c) he would suffer irreparable and certain harm if the requested relief was not granted;

d) he had a reasonable probability of success on the merits; and

e) such relief would not cause undue harm to the public interest.

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7. *Pennsylvania v. Williams* (1935), 294 U.S. 176, 55 S.Ct. 380, 79 L.Ed. 841; *Virginian Ry. Co. v. System Federation* (1937), 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; *Hecht Company v. Bowles* (1944), 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754; *Yakus v. United States* (1944), 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834; et al.

8. See such cases as *Railroad Commission of California v. Pacific Gas and Electric Co.* (1938), 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319, and *Illinois Commerce Commission v. Thomson* (1943), 318 U.S. 675, 63 S.Ct. 834, 87 L.Ed. 1075.



The evidence in support of a motion for a preliminary injunction is normally presented by the movant at a hearing and through the testimony of the moving party and other witnesses. It may, however, be in the form of proper affidavits and other admissible written materials. See generally, 11 Wright and Miller, *Federal Practice and Procedure*, §2949, p. 469, et seq., and 7 *Moore's Federal Practice*, §65.04 [3].

In the present case, however, Dr. Larkin presented ABSOLUTELY NO EVIDENCE in any shape or form to the court, which evidence established any, let alone all, of the above-mentioned requirements for the granting of his motion for a preliminary injunction. There was no evidentiary hearing and there were no affidavits or other written evidence presented by Dr. Larkin which in any way provided a factual basis showing the availability of equitable relief in this case or a factual basis supporting the granting of his motion.

In *Sampson v. Murray* (1974), — U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166, this Court reversed the granting of equitable relief. In so doing, it pointed out that proof of actual irreparable injury was necessary and that (94 S.Ct. at 952):

"* * * the record before us indicates that no witnesses were heard on the issue of irreparable injury, that respondent's complaint was not verified, and that the affidavit she submitted to the District Court did not touch in any way upon considerations relevant to irreparable injury. We are therefore somewhat puzzled about the basis for the District Court's conclusion that respondent 'may suffer irreparable injury.' * * *"

Here also, no witnesses were heard on the issue of irreparable injury or any other issue; the amended complaint was unverified; Dr. Larkin personally submitted no affidavits in support of his motion and the only affidavits submitted did

not touch upon considerations relevant to irreparable injury or any other issue listed above. Further, there were no findings of fact and no adequate conclusions of law as required by Rule 52 (a), FRCP, and the decision and judgment issued enjoining the "utilizing" of sec. 448.18 (7), Wis. Stats., exceeded the lawful scope of a preliminary injunction.

### 2. If the lower court here possessed any discretion to grant the motion, its decision is an abuse of discretion.

Ordinarily a motion for a preliminary injunction is addressed to the discretion of the lower court and this Court will not reverse in the absence of an abuse of discretion. This, of course, makes sense, but only if the posture of the case is such that discretion arose in the lower court. When, as here, there is an inadequate motion in that no grounds for its granting are stated therein as required by Rule 7 (b), FRCP, and there is a total and complete absence of any evidence establishing any ground for the granting of the motion, the discretion of the lower court should not even arise.

If discretion to grant the motion was here possessed by the lower court, that court clearly abused its discretion in this case. This abuse is established not only by the fact that the lower court decided and acted on the basis of an inadequate motion and in the total absence of any evidence in support of the granting of the motion, but in addition and as discussed below, by the fact that the lower court did not file findings of fact and conclusions of law as required by Rule 52 (a), FRCP, and the fact that the preliminary injunction issued was overly broad and exceeded the lawful scope of a preliminary injunction.

Rule 52 (a), FRCP, provides in part:



> "* * *in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. * * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *"

This Court has many times pointed out the importance of the findings of fact and conclusions of law required by Rule 52 (a) when a motion for interlocutory injunction is granted or refused.[9] There must be findings of fact which are sufficient to indicate a factual basis for the ultimate conclusion. *Kelley v. Everglades Drainage District* (1943), 319 U.S. 415, 422, 63 S.Ct. 1141, 87 L.Ed. 1485, and *Sampson v. Murray* (1974), — U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166.

In the present case, there was absolutely no evidence. The district court, therefore, could not and did not make any findings of fact, either in the form of Findings of Fact and Conclusions of Law or in the alternative form of its decision. A careful reading of the decision reveals that the district court erroneously arrived at two[10] of the here necessary

9. See, for example, *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774, and *Hatahley v. United States* (1956), 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065.

10. In its decision it appears that the court, without any evidence, arrived at the conclusion that Dr. Larkin had no adequate remedy at law (App. 4). This is solely based on an erroneous interpretation of the Wisconsin statutes. Contrary to the content of the decision, the constitutionality of "the statute *empowering* the board to act in the first instance" can be attacked in a ch. 227 judicial review of an administrative decision. Section 227.20, Wis. Stats., is on the subject of scope of review. The last sentence in sec. 227.20 (2), Wis. Stats., specially allows such a challenge. In fact, during the pendency of such a challenge the court may order a stay of the administrative decision. See sec. 227.17, Wis. Stats.

Further, the completely improper and erroneous declaration that sec. 448.18 (7), Wis. Stats., is unconstitutional (App. 4) might be construed as the necessary conclusion that Dr. Larkin had a reasonable probability of success on the merits. It should be noted, however, that Dr. Larkin's assertions of why the statutes alleged by him to be unconstitutional are unconstitutional are contained only in his unverified amended complaint. The lower court did *not* find any merit in Dr. Larkin's assertions, but made up its own reason why sec. 448.18 (7), Wis. Stats., "is unconstitutional," which reason is without a factual basis in the evidence, overlooks the last sentence of the statute involved, and as shown in Argument I, B, *supra*, is contrary to all applicable decisions of this Court and the courts of appeals.

five/[11] conclusions of law. There can be no valid conclusions of law, however, in the absence of findings of fact supported by the evidence presented to the court. When, as here, there is no evidence there can be no findings of fact and conclusions of law.

The fact that the district court here erred in declaring a state statute unconstitutional on a mere motion for a preliminary injunction, caused the court to again err in that it entered a preliminary injunction which is too broad in scope. The judgment of the district court herein provides:

> "* * * the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats." (App. 5.)

This means, or at least appears to mean, that the Board is enjoined from utilizing the provisions of sec. 448.18 (7), Wis. Stats., to temporarily suspend the medical license of any licensee, not just Dr. Larkin, and is so enjoined whether or not it had previously conducted an investigation under the provisions of sec. 448.17, Wis. Stats. If it does so mean, such broad relief is completely beyond the scope of a preliminary injunction, which is a device for maintaining the status quo between the parties pending a decision on the merits. The purposes of a preliminary injunction are to protect the movant therefor, here only Dr. Larkin, from suffering irreparable injury during the pendency of the action and to preserve the court's power to render a meaningful decision after trial on the merits of the case. See, 11 Wright and Miller, *Federal Practice and Procedure*, §2947, p. 423.

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11. There was no conclusion, as is essential, that Dr. Larkin would suffer irreparable injury if the requested relief was not granted and no conclusion that Dr. Larkin had exhausted his administrative remedies or that the granting of the relief sought would not cause undue harm to the public interest.



A federal district court has no power to enjoin the general application of a state statute unless and until it finds that the statute is unconstitutional after trial on the merits.

If, and despite the sweeping language of the judgment, the defendants are preliminarily enjoined from utilization of the state statute against Dr. Larkin only, the judgment is in violation of Rule 65 (d), FRCP, because of the lack of reasonable specificity. See, *Schmidt v. Lessard* (1974), — U.S. —, 94 S.Ct. 713, 38 L.Ed. 2d 661.

The decision of the lower court must be reversed, either summarily or after briefs and oral argument before this Court, because it is contrary to all applicable decisions of this Court. It improperly and erroneously declares that a state statute is unconstitutional in deciding a mere motion for a preliminary injunction; it erroneously decided that it is a violation of due process for an administrative agency to possess and exercise both investigative and adjudicative functions; and it erroneously decided to and did grant overly broad preliminary injunctive relief in the total absence of any allegations or any evidence establishing either the availability of such relief in this case or any grounds for the granting of the relief, the latter being an abuse of discretion, if any discretion to grant the motion was here possessed by the lower court.

## II. The Decision Of The Lower Court Is The Result Of Such A Departure From The Accepted And Usual Course Of Judicial Proceedings That This Court Should Exercise Its Power Of Supervision Over Lower Federal Courts And Take Appropriate Action.

In recent years this Court has become concerned with the inappropriate interference of lower federal courts in various

state court actions and state administrative proceedings and with the tendency of some lower federal courts to fail to recognize the existence and efficacy of state court systems. This concern is reflected in such cases as *Younger v. Harris* (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669; *Askew v. Hargrave* (1971), 401 U.S. 476, 91 S.Ct. 856, 28 L. Ed. 2d 196; *Mitchum v. Foster* (1972), 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed. 2d 705; and *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488.

This same concern has long been shared by Congress which has passed the anti-injunction statute, 28 U.S.C. 2283, and 28 U.S.C. §2281 requiring, in part, that when, as here, a preliminary injunction is sought in a federal court to enjoin the enforcement of a state statute on the ground of its alleged unconstitutionality such a motion must be decided by a three-judge court. The purpose of 28 U.S.C. §2281 was stated by this Court in *Moody v. Flowers* (1967), 387 U.S. 97, 101, 87 S.Ct. 1544, 18 L.Ed. 2d 643, in which it wrote:

> "* * * The purpose of §2281 is 'to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order' (Kennedy v Mendoza-Martinez, 372 US 144, 154, 9 L ed 2d 644, 652, 83 S Ct 554), and to provide 'procedural protection against an improvident statewide doom by a federal court of a state's legislative policy.' Phillips v United States, 312 US 246, 251, 85 L ed 2d 800, 805, 61 S Ct 480. * * *"

In the present case, there was no abstention, or consideration of the question whether the federal court should abstain, and there was no recognition of the principles of equity, comity, and federalism. There was a three-judge



court, but this device was ineffective in achieving the basic purpose of §2281, since it did not provide "protection against an improvident statewide doom by a federal court of a state's legislative policy."/12

The three-judge court herein not only improperly and erroneously declared a state statute unconstitutional and erroneously enjoined its general utilization in deciding a mere motion for a preliminary injunction, but it even failed to follow the applicable requirements of the Federal Rules of Civil Procedure, which are designed to afford procedural due process to *both* parties in an action. Here, however, in the name of a nonexistent concept of affording minimal due process to Dr. Larkin, the lower court herein denied to the members of the Board, and indirectly to all citizens of the State of Wisconsin whom they represent, procedural due process as it does exist in black and white in the Federal Rules of Civil Procedure.

The lower court herein entered a declaratory judgment declaring a state statute unconstitutional on a mere motion for a preliminary injunction, in the total absence of any evidence supporting such a conclusion, and in the absence of a trial on the merits as contemplated by Rule 57, FRCP; it granted the motion which motion was legally insufficient and inadequate under Rule 7 (b), FRCP; it conducted no evidentiary hearing, in violation of the intent, if not the letter, of Rule 65 (b), FRCP; it decided to grant a motion without any

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12. This Court has held that in exercising its valid objective of protecting the health and welfare of its citizens the state may regulate the practice of medicine and may create and vest in an administrative board the supervision and enforcement of such regulations. See, *Semler v. Oregon State Board of Dental Examiners* (1935), 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086, and *Geiger v. Jenkins* (1971), 401 U.S. 985, 91 S.Ct. 1236, 28 L.Ed. 2d 525, summarily affirming *Geiger v. Jenkins* (N.D. Ga. 1970), 316 F. Supp. 370.

evidence in support of such action, and failed to file the findings of fact and conclusions of law required by Rule 52 (a), FRCP; the form and scope of its preliminary injunction fails to comply with Rule 65 (d), FRCP, and it was only after the members of the Board made a motion for entry of judgment and submitted a brief in support thereof that the court entered a judgment as defined by Rule 54 (a), FRCP, and in at least token compliance with Rule 58 and Rule 65 (d), FRCP.

In the somewhat comparable, but less flagrant, case of *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774, this Court unanimously reversed a judgment in which the lower court on a mere motion for a preliminary injunction declared a state statute to be unconstitutional. The majority reversed and remanded the case to the lower court for proper action. The concurring justices, however, would have ordered dismissal as to certain appellees and a dissolving of the three-judge court as to the remaining appellees. Justice Frankfurter, in whose concurring opinion Justices Black and Douglas joined, viewed the judgment of the three-judge court as a flagrant abuse of the judicial process and wrote (309 U.S. at 321, 322):

> "I do not believe we should now let this bill hang over next year's crop. *We ought not to encourage the use of the judicial process for such unjustifiable attempts to set aside a state law by allowing them to be successful in result even though legally erroneous.* We ought to apply what was characterized in Massachusetts State Grange v. Benton, 272 US 525, 527, 71 L ed 387, 390, 47 S Ct 189, as 'the important rule, which we desire to emphasize, that no injunction ought to issue against officers of a State clothed with authority to enforce the law in



> question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.' * * * Congress has also given indication in §266 of the Judicial Code (28 USCA §380) of its *concern over the misuse of the injunction, fashioned for settling an ordinary clash of private interests, to restrain the machinery of a state in carrying out some vital state policy.*
>
> *"The supervisory power of this Court over the district courts becomes especially appropriate in equity suits. We ought to feel free to apply the traditional powers of the chancellor on appeal to act as though the suit were before him de novo.* Compare United States v. Rio Grande Dam & Irrig. Co. 184 US 416, 423, 46 L ed 619, 622, 22 S Ct 428. The present case demands that we enforce the 'important rule' of Massachusetts State Grange v. Benton, 272 US 525, 71 L ed 387, 47 S Ct 189, supra.
>
> *"Inasmuch as the Florida statute is obviously constitutional, the bill does not raise a substantial federal question* and the District Court was without jurisdiction to entertain it on behalf of the appellees who are citizens of Florida. As to them, the case should be remanded to the District Court with directions to dismiss the bill." (Emphasis added.)

Here also sec. 448.18 (7), Wis. Stats., "is obviously constitutional," since the last sentence thereof expressly provides for the "independent decisionmaker" which the lower court found to be absent. Under these circumstances there should be reversal and remand with directions to dismiss the amended complaint herein accompanied by appropriate directions to the lower court aimed at stopping the abuse of injunctive relief revealed by this case and at restoring obeyance to the decisions of this Court and the accepted and usual course of judicial proceedings as set forth in the Federal Rules of Civil Procedure.

## III. The Effect Of The Decision Below Is Widespread And Undesirable.

The very nature of administrative agencies at all levels of government is that they possess and exercise a variety of functions, normally including investigative and adjudicative functions. If the decision of the lower court in this case is correct, it will have a major and destructive impact on all administrative agencies. It will also have a major and destructive impact on the conduct of the people's increasingly complex public business, for it is to handle such public "business" that administrative agencies were created, have been developed, and have grown in size and scope of responsibility and activity. Although administrative agencies have many faults, the decision in this case, just as the comparatively miniscule "advocate-judge-multiple-hat suggestion" rejected by this Court in *Richardson v. Perales* (1971), 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed. 2d 842:

> "* * * assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. * * *"

The decision in this case is NOT that it is a violation of due process for an agency employe who investigated a matter to act as an adjudicator of the same matter; it is NOT that it is a violation of due process for an individual member of a board or commission to refuse to disqualify himself or for the board or commission to refuse to disqualify him, when he is, in fact, disqualified by actual bias, direct pecuniary interest in the outcome, prior personal involvement as an adversary in the same matter, et al., and it is NOT that it is a violation of due process for an illegally constituted board



or commission to adjudicate. The decision here IS that the mere possession and exercise of both investigative and adjudicative functions by the same agency is a violation of due process.

If this is true, all local, state, and federal legislative grants of power to adjudicate to agencies also possessing the power to investigate the same subject or subject matter are unconstitutional as a violation of due process. This includes every major federal administrative agency and even those whose adjudications fall within the coverage of the Federal Administrative Procedure Act.

The Federal Administrative Procedure Act recognizes that an administrative agency may possess and exercise both investigative and adjudicative functions. On the basis of this fact, the present decision also makes the APA unconstitutional even though §554 (d) thereof does attempt to insulate certain[13] adjudications of covered agencies,[14] which adjudications are made by agency employes, from influence by other employes possessing investigative and prosecuting functions.

In fact, under the provisions of the Federal Administrative Procedure Act and contrary to the decision in this case, it is entirely proper for the members of the Wisconsin Medical Examining Board to conduct a contested hearing and to adjudicate whether or not Dr. Larkin's license to practice medicine in Wisconsin should be temporarily suspended after they had conducted an ex parte investigation of

---

13. That subsection does not apply "(A) in determining applications for initial licenses; (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or (C) *to the agency or a member or members of the body comprising the agency.*" 5 U.S.C. §554 (d).

14. Some agencies, such as the Immigration Service, are not covered by the APA. See *Marcello v. Bonds* (1955), 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107.

his medical practices. See the emphasized portion of 5 U.S.C. §554 (d) (2) (C), found in footnote 13, *supra*.

## CONCLUSION

For the reasons stated above this Court should either summarily reverse the judgment herein and remand this case to the district court with directions to dismiss the action or it should note probable jursidiction herein.

Respectfully submitted,

ROBERT W. WARREN
*Attorney General of Wisconsin*

BETTY R. BROWN
*Solicitor General of Wisconsin*

LE ROY L. DALTON
*Assistant Attorney General of Wisconsin*

*Counsel for Appellants*

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702

April 18, 1974

# APPENDIX

# INDEX TO APPENDIX

*Page*

DECISION of the Three-Judge United States District Court for the Eastern District of Wisconsin, dated December 21, 1973 ..... 2

JUDGMENT on Decision by the Three-Judge United States District Court for the Eastern District of Wisconsin, dated January 31, 1974 ..... 4

NOTICE OF APPEAL to the Supreme Court of the United States, dated February 28, 1974, and filed in the United States District Court for the Eastern District of Wisconsin on March 1, 1974 ..... 6

DECISION of the Three-Judge United States District Court for the Eastern District of Wisconsin, dated December 21, 1973:

DUANE LARKIN, M.D.,
Plaintiff,

v. No. 73-C-360

HAROLD WITHROW, D.O., et al.,
Defendants.

## DECISION

On November 19, 1973, this three-judge court sustained the plaintiff's procedural due process challenge to the constitutionality of § 448.18 (7) Wis. Stats. (1971). We enjoined the state medical examining board from enforcing that statute, which authorized it to suspend a physician's license for up to two consecutive three-month periods "without formal proceedings . . . where he is known or the examining board has good cause to believe" that he has engaged in certain proscribed conduct. Vague as it is, "(E)ngaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public" qualifies as one such offense. See § 448.18 (1) (a), Wis. Stats. (1971).

Permanent revocation of a physician's license can be accomplished only through a court action prosecuted by the district attorney. The state medical examining board investigated the plaintiff, Dr. Duane Larkin, and presented charges to the district attorney. See § 447 [sic], Wis. Stats. (1971). Neither the propriety of the board's investigation of Dr. Larkin nor the merits of its charges against him was involved here. What we determined was that for the board temporarily to



suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as § 448.18 (7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decisionmaker, we concluded that it was unconstitutional and unenforceable.

Procedural due process is required in those instances where a person stands to see significant interference with his property rights or his liberty. Board of Regents v. Roth, 408 U.S. 564 (1972). In our view, the interference with a physician's ability to practice his profession qualifies as an interference with a property right. It is certainly "a sufficiently direct threat of personal detriment." Doe v. Bolton, 410 U.S. 179, 188 (1973).

The suspension of his license to practice medicine, as the result of charges of improper conduct, presumptively has a serious adverse effect on the physician's reputation. Thus, it is clear that the plaintiff's liberty is also at stake. 408 U.S. at 573. "There is little doubt but that a person's interest in his reputation is sufficient to trigger procedural due process protection." Suarez v. Weaver, — F. 2d — (7th Cir., case number 72-1656, decided September 14, 1973). See also Wisconsin v. Constantineau, 400 U.S. 433 (1971); and Weiman v. Updegraff, 344 U.S. 183 (1952).

In several cases involving hearings required by due process, the United States Supreme Court has delved into the area of minimal due process requirements. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Court reaffirmed the principle of Morrissey v. Brewer, 408 U.S. 471 (1972), that one of the minimum elements of such hearings is "an independent decisionmaker." 411 U.S. at 786. The state medical examining board

does not qualify as such a decisionmaker. It cannot properly rule with regard to the merits of the same charges it investigated and, as in this case, presented to the district attorney.

It is true that any action taken by the board pursuant to § 448.18 (7) is subject to judicial review under § 227, Wis. Stats. (1971). However, that review statute goes only to the propriety of the board's *exercise* of statutory authority. We found that the very statutory authority *empowering* the board to act in the first instance was itself unconstitutional.

For these reasons, on November 19, 1973, we ordered that the plaintiff's motion for a preliminary injunction be granted. The defendants were enjoined from enforcing the provisions of § 448.18 (7), Wis. Stats. (1971), it having been determined by us that such statute is unconstitutional.

Dated at Milwaukee, Wisconsin, this 21st day of December, 1973.

/s/ F. Ryan Duffy
F. Ryan Duffy, Sr. Circuit Judge

/s/ John W. Reynolds
John W. Reynolds, U.S. District Judge

/s/ Myron L. Gordon
Myron L. Gordon, U.S. District Judge

JUDGMENT on Decision by the Court, dated January 31, 1974:

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

Civil Action File No. 73-C-360



DUANE LARKIN, M.D.,
Plaintiff,

vs.

JUDGMENT

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A. J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D., individually and as members of the Medical Examining Board of the State of Wisconsin,
Defendants.

This action came on for hearing before the Court, Honorable F. Ryan Duffy, Senior United States Circuit Judge, Honorable John W. Reynolds, United States District Judge and the Honorable Myron L. Gordon, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that §448.18 (7), Wis. Stats., is unconstitutional and that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats.

APPROVED:

/s/ F. Ryan Duffy
F. Ryan Duffy, Sr. U.S. Circuit Judge

/s/ John W. Reynolds
John W. Reynolds, U.S. District Judge

/s/ Myron L. Gordon
Myron L. Gordon, U.S. District Judge

Dated at Milwaukee, Wisconsin, this 31st day of January, 1974.

s/ Ruth W. LaFave
Clerk of Court

NOTICE OF APPEAL to the Supreme Court of the United States, dated February 28, 1974, and filed in the United States District Court for the Eastern District of Wisconsin on March 1, 1974:

DUANE LARKIN, M.D.,
Plaintiff,

v. No. 73-C-360

HAROLD WITHROW, D.O.;
THOMAS HENNEY, M.D.;
A. J. SANFELIPPO, M.D.;
JOHN M. IRVIN, M.D.;
J. W. RUPEL, M.D.;
A. L. FREEDMAN, M.D.;
MARK T. O'MEARA, M.D.;
THOMAS W. TORMEY, JR., M.D.;
individually and as members of
the Medical Examining Board of
the State of Wisconsin,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the defendants do hereby appeal to the Supreme Court of the United States from the judgment of the three-judge court in the captioned matter entered on the 31st day of January, 1974, by the three-judge court of the United States District Court for the Eastern District of Wisconsin made up of the Honorable F. Ryan Duffy, Sr., United States Circuit Judge, the Honorable John W. Reynolds, United States District Judge, and the Honorable Myron L. Gordon, United States District Judge.



This appeal is taken pursuant to 28 U.S.C. §1253.

Dated this 28th day of February, 1974.

ROBERT W. WARREN
Attorney General of Wisconsin

/s/ LeRoy L. Dalton
LE ROY L. DALTON
Assistant Attorney General

Attorneys for Defendants-Appellants

P.O. Address:
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Madison, Wisconsin 53702

Telephone: 608-266-3863

Supreme Court, U. S.
FILED
JUL 23 1974
MICHAEL RODAK, JR., CLERK

# APPENDIX

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1573

HAROLD WITHROW, D.O., et al.,
*Appellants,*

*v.*

DUANE LARKIN, M.D.,
*Appellee.*

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN**

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**APPEAL DOCKETED APRIL 22, 1974**
**JURISDICTION NOTED JUNE 10, 1974**

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1573

HAROLD WITHROW, D.O., et al.,
*Appellants,*

*v.*

DUANE LARKIN, M.D.,
*Appellee.*

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN**

## APPENDIX INDEX

*Page*

Chronological List of Relevant Docket Entries ..... 4

Complaint. Filed July 6, 1973 ..... 7

Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. Filed July 6, 1973 ..... 16

Plaintiff's Motion for Leave to Take Depositions Prior to the Expiration of Thirty Days. Filed July 6, 1973 ..... 17

*Page*

Amended Complaint.
Filed July 12, 1973 ..... 18

Plaintiff's Motion for Three-Judge Court.
Filed July 12, 1973 ..... 25

Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction with Affidavit.
Filed July 12, 1973 ..... 25

Defendants' Notice of Motion and Motion to Dismiss. Filed July 12, 1973 ..... 31

Order Denying Motions for Temporary Restraining Order and Leave to Commence Taking Depositions; Briefs Ordered on Motion for Preliminary Injunction.
Filed July 13, 1973 ..... 32

Order Denying Temporary Restraining Order.
Filed July 18, 1973 ..... 33

Affidavit of Robert H. Friebert in Support of Motion for Preliminary Injunction.
Filed July 24, 1973 ..... 35

Amended Motion to Dismiss.
Filed July 30, 1973 ..... 37

Affidavit of Robert H. Friebert in Support of Motion for Temporary Restraining Order and Preliminary Injunction.
Filed July 30, 1973 ..... 38

Affidavit of Robert H. Friebert in Support of Motion for Temporary Restraining Order and Preliminary Injunction.
Filed September 20, 1973 ..... 44



*Page*

Motion for Temporary Restraining Order and Interlocutory Injunction.
Filed September 27, 1973 ..... 46

Decision and Order, Granting Request for Three-Judge Court, Denying Motion to Dismiss, and Granting Temporary Restraining Order. Filed October 1, 1973 ..... 47

Motion for Temporary Restraining Order With Supporting Affidavit.
Filed October 3, 1973 ..... 53

Affidavit of Robert H. Friebert in Support of Motion for Preliminary Injunction.
Filed October 29, 1973 ..... 55

Answer of Defendants to Amended Complaint.
Filed November 1, 1973 ..... 60

Affidavit of LeRoy L. Dalton in Opposition to Motion for Preliminary Injunction.
Filed November 2, 1973 ..... 62

Decision of the Three-Judge United States District Court for the Eastern District of Wisconsin. Filed December 21, 1973 ..... 64

Judgment on Decision by the Court.
Filed January 31, 1974 ..... 65

Notice of Appeal. Filed March 1, 1974 ..... 65

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

| | |
|---|---|
| 7/6/1973 | Complaint filed; summons issued. |
| 7/6/1973 | Plaintiff's motion for temporary restraining order and preliminary injunction. |
| 7/6/1973 | Plaintiff's motion for leave to take depositions prior to expiration of thirty days. |
| 7/12/1973 | Plaintiff's amended complaint. |
| 7/12/1973 | Plaintiff's motion for three-judge court. |
| 7/12/1973 | Plaintiff's new motion for temporary restraining order and preliminary injunction, with affidavit. |
| 7/12/1973 | Defendants' notice of motion and motion to dismiss. |
| 7/13/1973 | Order denying plaintiff's motions for temporary restraining order and leave to commence taking depositions; briefs ordered on plaintiff's motion for preliminary injunction. |
| 7/18/1973 | Order denying plaintiff's motion for temporary restraining order. |
| 7/24/1973 | Plaintiff's affidavit of Robert H. Friebert in support of motion for preliminary injunction. |
| 7/25/1973 | Marshal's return of service. Summons, complaint, and motions served on all defendants. |
| 7/26/1973 | Defendants' request for admission under Rule 36, FRCP. |
| 7/30/1973 | Defendants' amended motion to dismiss. |



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| 7/30/1973 | Plaintiff's affidavit of Robert H. Friebert in support of motion for temporary restraining order and preliminary injunction. |
| 7/30/1973 | Plaintiff's motion to quash request for admission. |
| 8/1/1973 | Decision and order denying plaintiff's motion for entry of order quashing the request for admission under Rule 36, FRCP. |
| 8/3/1973 | Defendants' motion to amend request for admission. |
| 9/20/1973 | Plaintiff's affidavit of Robert H. Friebert in support of motion for temporary restraining order and preliminary injunction. |
| 9/27/1973 | Plaintiff's motion for temporary restraining order and interlocutory injunction. |
| 10/1/1973 | Decision and order granting plaintiff's motion for a three-judge court, denying defendants' motion to dismiss the action, granting plaintiff's motion for temporary restraining order. |
| 10/3/1973 | Plaintiff's motion for temporary restraining order, with supporting affidavit. |
| 10/5/1973 | Order designating the Honorable F. Ryan Duffy, the Honorable John W. Reynolds, and the Honorable Myron L. Gordon to hear and determine this case. |
| 10/29/1973 | Plaintiff's affidavit of Robert H. Friebert in support of motion for preliminary injunction. |
| 11/1/1973 | Answer of defendants to amended complaint. |
| 11/1/1973 | Defendants' motion to overrule plaintiff's objections to request for admissions. |

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|---|---|
| 11/2/1973 | Affidavit of LeRoy Dalton in opposition to motion for preliminary injunction. |
| 11/19/1973 | Hearing on plaintiff's motion for preliminary injunction. Preliminary injunction ordered. |
| 12/12/1973 | Plaintiff's objections to request for admission under Rule 36, FRCP. |
| 12/21/1973 | Order that plaintiff's objections to request for admissions are overruled; plaintiff ordered to answer within 30 days from date of order. |
| 12/21/1973 | Decision of three-judge court granting plaintiff's motion for preliminary injunction. Defendants are enjoined from enforcing provisions of §448.18 (7), Wis. Stats. |
| 1/17/1974 | Plaintiff's interrogatories to defendants. |
| 1/21/1974 | Plaintiff's responses to request for admission. |
| 1/30/1974 | Defendants' notice of motion and motion for entry of judgment, with supporting memorandum. |
| 1/31/1974 | Judgment entered pursuant to decision of December 21, 1973. |
| 2/7/1974 | Defendants' objections to interrogatories under Rule 33, FRCP. |
| 3/1/1974 | Defendants' notice of appeal to the Supreme Court of the United States, with proof of service. |



**COMPLAINT. Filed July 6, 1973.**
**[Document No. 1]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DUANE LARKIN, M.D.,
Plaintiff,

v.

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.;
A. J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.;
J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.;
MARK T. O'MEARA, M.D.;
THOMAS W. TORMEY, JR., M.D.;
individually and as members of the Medical
Examining Board of the State of Wisconsin,
Defendants.

Case No. 73-C-360

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The plaintiff, by his attorney, alleges and shows to the Court as follows:

1. That the plaintiff brings this action to obtain injunctive relief for a threatened deprivation of rights, privileges and immunities as guaranteed by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

2. That jurisdiction of this action is conferred on this Court by Sec. 1343 of Title 28 of the United States Code and Sec. 1983 of Title 42 of the United States Code.

3. That the plaintiff is a physician and surgeon, is duly licensed under the laws of the State of Wisconsin to practice

medicine in the State of Wisconsin and has established offices at 710 North Sixth Street in the City of Milwaukee, Wisconsin, for the purpose of practicing medicine. The plaintiff is a resident of the State of Michigan.

4. That the defendant, HAROLD WITHROW, D.O., is an adult whose offices are located at the Hustisford Clinic, in Hustisford, Wisconsin and is a member of the Wisconsin Medical Examining Board, hereinafter referred to as "Board".

5. That the defendant, THOMAS HENNEY, M.D., is an adult whose offices are located at 916 Silver Lake Drive, Portage, Wisconsin and is a member of the Board.

6. That the defendant, A. J. SANFELIPPO, M.D., is an adult whose offices are located at 2414 North Farwell Avenue, Milwaukee, Wisconsin and is a member of the Board.

7. That the defendant, JOHN M. IRVIN, M.D., is an adult whose offices are located at the Medical Center of Monroe, Monroe, Wisconsin and is a member of the Board.

8. That the defendant, J. W. RUPEL, M.D., is an adult whose offices are located at the Marshfield Clinic, Marshfield, Wisconsin and is a member of the Board.

9. That the defendant, A. L. FREEDMAN, M.D., is an adult whose offices are located at 122 — 130 East Walnut Street, Green Bay, Wisconsin and is a member of the Board.

10. That the defendant, MARK T. O'MEARA, M.D., is an adult whose offices are located at 815 South 10th Street, LaCrosse, Wisconsin and is a member of the Board.

11. That the defendant, THOMAS W. TORMEY, JR., M.D., is the Secretary of the Board and is an adult whose



principal place of employment is the Medical Examining Board, 201 East Washington, Madison, Wisconsin.

12. That the defendants are sued individually and in their official capacity as members of the Board.

13. That as members of the Board, the defendants supervise and regulate the practice of medicine in the State of Wisconsin as empowered by Chapter 448, Wis. Stats.

14. That the plaintiff, in the fall of 1971, commenced engaging in the City of Milwaukee in the practice of medicine by administering medical treatment to pregnant women in accordance to law including abortions of unborn, unquick feti. Subsequently, the plaintiff commenced an action in the United States District Court for the Eastern District of Wisconsin entitled *Larkin v. McCann, et al,* Case No. 71-C-671 and incorporates that file herein by reference.

15. The plaintiff moved the Court for a Temporary Restraining Order and, on the 23rd day of December, 1971, the Honorable MYRON L. GORDON, District Judge for the Eastern District of Wisconsin executed a Temporary Restraining Order. A copy of that Order is attached as Exhibit A.

16. That Order remains in full force and effect at this time.

17. On the 20th day of June, 1973, the defendant, THOMAS W. TORMEY, JR., M.D., as Secretary of the Board and, upon information and belief, acting on behalf of all of the other defendants, executed a Notice of Investigative Hearing which is scheduled for the 12th day of July, 1973. A copy of that Notice is attached hereto as Exhibit B.

18. That, upon information and belief, contrary to the express language of the Notice that said hearing would be

closed to the public, the defendant, THOMAS W. TORMEY, JR., M.D., as Secretary for the Board and, upon information and belief, acting on behalf of all of the other defendants, issued a statement to the press acknowledging that the plaintiff was being investigated by the Board. A copy of an article which appeared in the Milwaukee Sentinel on June 28, 1973 is attached hereto as Exhibit C.

19. That, the Wisconsin abortion statute, Sec. 940.04, Wis. Stats. is unconstitutional.

20. That, upon information and belief, the defendants have initiated this investigation and have breached the secrecy of said proceedings in an effort to hinder the plaintiff in the practice of medicine and, to punish the plaintiff for administering abortions in the State of Wisconsin, all in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

21. That, the allegations as contained in the Notice of Investigative Hearing does not allege one fact of any substance against DR. LARKIN and is couched in terms which are vague, uncertain and overly broad and which cause persons of ordinary intelligence to guess as to their meaning and scope.

22. That the Board has attempted to enforce the Wisconsin abortion statute in the past against DR. ALFRED KENNAN of Madison but has been restrained from that activity by an order dated May 5, 1971 entered by the Honorable JAMES E. DOYLE, District Judge, Western District of Wisconsin. See *Kennan v. Warren, et al*, Case No. 71-C-132, incorporated herein by reference.



WHEREFORE, the plaintiff demands judgment as follows:

1. That the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors be permanently enjoined from enforcing Sec. 940.04, Wis. Stats. against the plaintiff or any of the plaintiff's employes, agents, servants, attorneys or persons acting under his direction and control or persons in active concert or participation with them by investigating the plaintiff and holding any kind of hearing pursuant to Chapter 448, Wis. Stats. unless the defendants give the plaintiff notice of specific allegations which are not vague, general and overly broad and which are not related to the fact that the plaintiff is engaged in administering abortions in Wisconsin or elsewhere.

2. For a Temporary Restraining Order and for a Preliminary Injunction against the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors enjoining them from enforcing Sec. 940.04, Wis. Stats. against the plaintiff or any of the plaintiff's employes, agents, servants, attorneys or persons acting under his direction and control, or persons in active concert or participation with them by investigating the plaintiff and holding any kind of hearing pursuant to Chapter 448, Wis. Stats. unless the defendants give the plaintiff notice of specific allegations which are not vague, general and overly broad and which are not related to the fact that the plaintiff is engaged in administering abortions in Wisconsin or elsewhere.

3. That the plaintiff recover his costs.

4. For such other further relief as may be proper.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT
Attorney for the Plaintiff

P. O. ADDRESS:
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130

EXHIBIT A TO COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

DUANE LARKIN,

Plaintiff,

vs.

TEMPORARY RESTRAINING ORDER

E. MICHAEL MC CANN, District Attorney of Milwaukee County, Wisconsin, ROBERT W. WARREN, Attorney General of the State of Wisconsin, HAROLD E. BRIER, Chief of Police, Milwaukee, Wisconsin individually and in their official capacity, their agents, servants, employees, attorneys, and persons acting under their direction and control, and persons in active concert or participation with them and their successors,

Defendants.



Upon the motion of the plaintiff, the affidavit of the plaintiff and all of the records, files and proceedings herein the court being advised in the premises,

IT IS HEREBY ORDERED THAT:

The defendants, their agents, servants, employees, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors, be and the same are hereby:

1. Restrained from the enforcement of §940.04 (1), Wisconsin Statutes, against the plaintiff or any of the plaintiff's employees, agents, servants, attorneys or persons acting under his direction and control, or persons in active concert or participation with them.

Dated this 23 day of December, 1971 at Milwaukee, Wisconsin.

BY THE COURT:

/s/ Myron L. Gordon
District Judge

EXHIBIT B TO COMPLAINT

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
MEDICAL EXAMINING BOARD

In the Matter of the Investigation of the Practices of DUANE LARKIN, M.D., Licensee

NOTICE OF INVESTIGATIVE HEARING

To: Duane Larkin, M.D.
710 N. 6th Street, #604
Milwaukee, Wi 53203

PLEASE TAKE NOTICE that in accordance with sec. 448.17, Stats., an investigative hearing will be held by the Medical Examining Board on the 12th day of July, 1973, at 2:00 o'clock in the afternoon of said day, in Room 361, Milwaukee State Office Building, 819 N. 6th Street, Milwaukee, Wisconsin, to determine whether the licensee has engaged in practices that are inimical to the public health, whether he has engaged in conduct unbecoming a person licensed to practice medicine, and whether he has engaged in conduct detrimental to the best interests of the public.

The investigative hearing will be closed to the public, but the licensee and/or his attorney may be present but will not be permitted to cross-examine witnesses.

Based on the evidence adduced at said investigative hearing the Medical Examining Board will determine whether to warn or reprimand if it finds such practice and whether to institute criminal action or action to revoke license if probable cause therefor exists under criminal or revocation statutes.

Dated at Madison, Wisconsin, this 20th day of June, 1973.

MEDICAL EXAMINING BOARD

By: /s/ Thos. W. Tormey, Jr., M.D.
Thos. W. Tormey, Jr., M.D., Secretary



EXHIBIT C TO COMPLAINT

Milwaukee Sentinel
6-28-73

# Medical Unit Summons Dr. Larkin

Dr. Duane Larkin, who officials say operates abortion clinics here and in two other cities, has been summoned to appear at a hearing before the State Board of Medical Examiners, it was learned Wednesday.

Larkin, whose clinics are at 530 W. Wisconsin Ave. and in Detroit and Chicago, according to officials, has been told to appear before the board at 2:45 p.m. July 12 in the State Office Building here.

Dr. Thomas W. Tormey Jr., the board's secretary, confirmed that the hearing was scheduled.

Larkin won a Federal Court restraining order in 1971 protecting him from prosecution in connection with the clinics.

Witnesses have been subpenaed to appear at the hearing, it was learned.

**PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION. Filed July 6, 1973.**
**[Document No. 2] [Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The plaintiff, by his attorney, hereby moves the Court pursuant to Rule 65 of the Federal Rules of Civil Procedure for a Temporary Restraining Order and Preliminary Injunction against the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors enjoining them from enforcing Sec. 940.04, Wis. Stats. against the plaintiff or any of the plaintiff's employes, agents, servants, attorneys or persons acting under his direction and control, or persons in active concert or participation with them by investigating the plaintiff and holding any kind of hearing pursuant to Chapter 448, Wis. Stats. unless the defendants give the plaintiff notice of specific allegations which are not vague, general and overly broad and which are not related to the fact that the plaintiff is engaged in adminstering abortions in Wisconsin or elsewhere.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT
Attorney for the Plaintiff



**PLAINTIFF'S MOTION FOR LEAVE TO TAKE DEPOSITIONS PRIOR TO THE EXPIRATION OF THIRTY DAYS. Filed July 6, 1973.**
**[Document No. 3] [Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The plaintiff, DR. DUANE LARKIN, by his attorney, ROBERT H. FRIEBERT, hereby moves the Court pursuant to Rule 30 (a) of the Federal Rules of Civil Procedure, for an order granting him leave to serve notice of taking of the depositions of all of the defendants in the above captioned case prior to the expiration of thirty (30) days after service of the Summons and Complaint upon them on the ground that these defendants are proceeding with an investigative hearing on July 12, 1973 at 2:00 in the afternoon. Said testimony might be necessary for the Court to rule on the plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction.

Dated at Milwaukee, Wisconsin this 6th day of July, 1973.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT
Attorney for the Plaintiff

**AMENDED COMPLAINT. Filed July 12, 1973.**
**[Document No. 4]**
**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

FIRST CAUSE OF ACTION

The plaintiff, by his attorney, alleges and shows to the Court as follows:

1. That the plaintiff brings this action to obtain injunctive and declaratory relief for a threatened deprivation of rights, privileges and immunities as guaranteed by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

2. That jurisdiction of this action is conferred on this Court by Sections 1343, 2201 and 2281, et *seq.* of Title 28 of the United States Code and Sec. 1983 of Title 42 of the United States Code.

3. That the plaintiff is a physician and surgeon, is duly licensed under the laws of the State of Wisconsin to practice medicine in the State of Wisconsin and has established offices at 710 North Sixth Street in the City of Milwaukee, Wisconsin, for the purpose of practicing medicine. The plaintiff is a resident of the State of Michigan.

4. That the defendant, HAROLD WITHROW, D. O., is an adult whose offices are located at the Hustisford Clinic, in Hustisford, Wisconsin and is a member of the Wisconsin Medical Examining Board, hereinafter referred to as "Board".

5. That the defendant, THOMAS HENNEY, M.D., is an adult whose offices are located at 916 Silver Lake Drive, Portage, Wisconsin and is a member of the Board.



6. That the defendant, A. J. SANFELIPPO, M.D., is an adult whose offices are located at 2414 North Farwell Avenue, Milwaukee, Wisconsin and is a member of the Board.

7. That the defendant, JOHN M. IRVIN, M.D., is an adult whose offices are located at the Medical Center of Monroe, Monroe, Wisconsin and is a member of the Board.

8. That the defendant, J. W. RUPEL, M.D., is an adult whose offices are located at the Marshfield Clinic, Marshfield, Wisconsin and is a member of the Board.

9. That the defendant, A. L. FREEDMAN, M.D., is an adult whose offices are located at 122 - 130 East Walnut Street, Green Bay, Wisconsin and is a member of the Board.

10. That the defendant, MARK T. O'MEARA, M.D., is an adult whose offices are located at 815 South 10th Street, LaCrosse, Wisconsin and is a member of the Board.

11. That the defendant, THOMAS W. TORMEY, JR., M.D., is the Secretary of the Board and is an adult whose principal place of employment is the Medical Examining Board, 201 East Washington, Madison, Wisconsin.

12. That the defendants are sued individually and in their official capacity as members of the Board.

13. That as members of the Board, the defendants supervise and regulate the practice of medicine in the State of Wisconsin as empowered by Chapter 448, Wis. Stats.

14. That the plaintiff, in the fall of 1971, commenced engaging in the City of Milwaukee in the practice of medicine by administering medical treatment to pregnant women in accordance to law including abortions of unborn, unquick feti. Subsequently, the plaintiff commenced an action in the United States District Court for the Eastern District of Wisconsin

entitled *Larkin v. McCann, et al.* Case No. 71-C-671 and incorporates that file herein by reference.

15. The plaintiff moved the Court for a Temporary Restraining Order and, on the 23rd day of December, 1971, the Honorable MYRON L. GORDON, District Judge for the Eastern District of Wisconsin executed a Temporary Restraining Order. A copy of that Order is attached as Exhibit A.

16. That Order remains in full force and effect at this time.

17. On the 20th day of June, 1973, the defendant, THOMAS W. TORMEY, JR., M.D., as Secretary of the Board and, upon information and belief, acting on behalf of all of the other defendants, executed a Notice of Investigative Hearing which is scheduled for the 12th day of July, 1973. A copy of that Notice is attached hereto as Exhibit B.

18. That, upon information and belief, contrary to the express language of the Notice that said hearing would be closed to the public, the defendant, THOMAS W. TORMEY, Jr., M.D., as Secretary for the Board and, upon information and belief, acting on behalf of all of the other defendants, issued a statement to the press acknowledging that the plaintiff was being investigated by the Board. A copy of an article which appeared in the Milwaukee Sentinel on June 28, 1973 is attached hereto as Exhibit C.

19. That, the Wisconsin abortion statute, Sec. 940.04, Wis. Stats. is unconstitutional.

20. That, upon information and belief, the defendants have initiated this investigation and have breached the secrecy of said proceedings in an effort to hinder the plaintiff in the practice of medicine and, to punish the plaintiff for administering abortions in the State of Wisconsin, all in violation of



rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

21. That, the allegations as contained in the Notice of Investigative Hearing does not allege one fact of any substance against DR. LARKIN and is couched in terms which are vague, uncertain and overly broad and which cause persons of ordinary intelligence to guess as to their meaning and scope.

22. That the Board has attempted to enforce the Wisconsin abortion statute in the past against DR. ALFRED KENNAN of Madison but has been restrained from that activity by an order dated May 5, 1971 entered by the Honorable JAMES E. DOYLE, District Judge, Western District of Wisconsin. See *Kennan v. Warren, et al,* Case No. 71-C-132, incorporated herein by reference.

## SECOND CAUSE OF ACTION

As and for a Second Cause of Action, the plaintiff, by his attorney, alleges and shows to the Court as follows:

1. The plaintiff realleges each and every allegation contained in the First Cause of Action and incorporates them herein by reference.

2. The proceedings of the Medical Examining Board as instituted against the plaintiff and as authorized by Chapter 448, Wis. Stats., a copy of which is attached hereto as Exhibit D, are unconstitutional and in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution in that:

(a) The phrases "inimical to the public health", "conduct unbecoming a person licensed to practice medicine" and "conduct detrimental to the best interests of the

public" are vague, overly broad and cause men of reasonable intelligence to guess as to their meaning and effect thereby depriving the plaintiff of notice of prohibited practices as well as providing the defendants with authority to investigate and warn, reprimand or institute criminal actions for activities of the plaintiff which are protected by the Constitution of the United States of America.

(b) The Notice of Investigative Hearing, Exhibit B, states that at the conclusion of the hearing the Board will determine whether to warn or reprimand the plaintiff or whether the Board will institute criminal actions or actions to revoke license if they conclude that probable cause exists and, said notice prohibits the plaintiff and his attorney from cross examining any of the witnesses against him and from in any way appearing in these hearings in a meaningful fashion thereby subjecting the plaintiff to punishment and official condemnation without being afforded his right to be confronted by the witnesses against him, without being afforded his right to notice of the nature of the charges against him, without being afforded the opportunity to produce witnesses on his behalf, without being afforded the compulsory process for witnesses, and without being afforded a trial by jury or by persons other than his accusers, all in violations of rights guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(c) The Medical Examining Board of the State of Wisconsin has not promulgated any rules with respect to the conduct of these proceedings. Thus, the proceedings will be regulated on an *ad hoc* basis in violation of due process of law because there are no rules to determine what process is due the plaintiff.

(d) The Notice of Investigative Hearing states that a criminal action will be brought against the plaintiff if the Board finds probable cause under the criminal statutes of the State of Wisconsin. This proceeding denies



to the plaintiff the right to have a determination of probable cause made by an impartial, neutral, independent and detached judicial officer or by a grand jury, in violation of rights guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

3. These proceedings as embodied in the Notice of Investigative Hearing are brought pursuant to authority which appears in Sec. 448.17 and 448.18, Wis. Stats. These statutes authorize the Board to warn, reprimand, determine probable cause, suspend a license, and temporarily suspend a license and, such statutory scheme is in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution as more particularly set forth in the preceding paragraph.

WHEREFORE, the plaintiff demands judgment as follows:

1. That a judgment be entered declaring the procedures employed by the defendants as members of the Medical Examining Board of the State of Wisconsin as embodied in the Notice of Investigative Hearing, Exhibit B, and Sections 448.17 and 448.18, Wis. Stats. to be unconstitutional and in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

2. That a judgment be entered declaring that the actions of the defendants as applied to the plaintiff are unconstitutional and in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

3. That the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control and persons acting in active concert or participation with

them and their successors be permanently enjoined from enforcing Sec. 940.04, Wis. Stats. against the plaintiff or any of the plaintiff's employes, agents, servants, attorneys or persons acting under his direction and control or persons in active concert or participation with them.

4. That the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors be permanently enjoined from investigating the plaintiff under the procedures as outlined in the Notice of Investigative Hearing and under the authority of Sections 448.17 and 448.18, Wis. Stats. and the procedures contained therein.

5. For a Temporary Restraining Order and for a Preliminary Injunction against the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors enjoining them from investigating the plaintiff under the procedures as outlined in the Notice of Investigative Hearing and under the authority of Sections 448.17 and 448.18, Wis. Stats. and the procedures contained therein.

6. That the plaintiff recover his costs.

7. For such other further relief as may be proper.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT
Attorney for the Plaintiff

## EXHIBITS A, B, AND C TO AMENDED COMPLAINT

These exhibits are identical to Exhibits A, B, and C to the Complaint filed July 6, 1973, which are printed at pages 12-15 of this Appendix.



## EXHIBIT D TO AMENDED COMPLAINT

Photocopy of Chapter 448 of the Wisconsin Statutes
[Omitted in printing.]

## PLAINTIFF'S MOTION FOR THREE-JUDGE COURT

**Filed July 12, 1973.** [Document No. 5]
**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The plaintiff, by his attorney, hereby moves the Court pursuant to the provisions of 28 U.S.C. Sec. 2281, *et seq.* for the convening of a three-judge court in the above captioned case.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT
Attorney for the Plaintiff

## PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, WITH AFFIDAVIT. Filed July 12, 1973.

**[Document No. 6] [Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The plaintiff, by his attorney, hereby moves the Court pursuant to Rule 65 of the Federal Rules of Civil Procedure for a Temporary Restraining Order and Preliminary Injunction against the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them, and their successors enjoining them from investigating

the plaintiff under the procedures as outlined in the Notice of Investigative Hearing and under the authority of Sections 448.17 and 448.18, Wis. Stats. and the procedures contained therein.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT
Attorney for the Plaintiff

[Title omitted in printing.] AFFIDAVIT

STATE OF WISCONSIN )
) SS.
MILWAUKEE COUNTY )

ROBERT H. FRIEBERT, being first duly sworn, on oath, deposes and says that:

1. He is the attorney for the plaintiff Dr. Duane Larkin.

2. Attached to this Affidavit is a copy of an article which appeared in the Milwaukee Journal on Friday, July 13, 1973 which discloses that the defendant Dr. John Irvin, the chairman of the Medical Examining Board of the State of Wisconsin consented to an interview with reporters and that in this interview Dr. Irvin acknowledged that there was an investigation of the plaintiff in progress, that the information of any such hearing will be released at a later date when a decision is made and the professions of witnesses which were scheduled to appear and their relationship to Dr. Larkin.

3. The plaintiff did not consent to any such publicity or release of any information whatsoever to the public as is disclosed in the same article's reference to your client's refusal to talk to the reporter.

4. This Affidavit is made in support of a motion for a preliminary injunction.



Dated at Milwaukee, Wisconsin, this 16th day of July, 1973.

/s/ Robert H. Friebert
Robert H. Friebert

[Jurat omitted in printing.]

# Abortionist Probe Hears 8 Testify

Further investigative hearings into the medical practices of Dr. Duane Larkin, a Michigan resident who operates an abortion clinic here, are expected to be held this summer, possibly in Milwaukee and Madison, according to the chairman of the state Medical Examiners Board, Dr. John M. Irvin.

The board is expected to end two days of hearings here Friday, but no results are likely until additional witnesses are called to testify, Irvin said.

*Dr. Duane Larkin*

Larkin did not appear at the closed hearing at the State Office Building Thursday. Eight witnesses, including former employes of Larkin, two newspaper reporters and the board's investigator, George W. Bendrick, testified.

The board, a licensing investigative and regulatory body, licenses physicians.

**Hearings Closed**

According to the notice of the hearing sent to Larkin, the purpose of the hearing was "to determine whether (Larkin) has engaged in practices that are inimical to the public health, whether he has engaged in conduct unbecoming a person licensed to practice medicine and whether he has engaged in conduct detrimental to the best interests of the public.

The hearings are closed because information, possibly hearing on the physician's reputation, is not to be released until a decision is made, Irvin said. All witnesses gave sworn testimony and appeared without attorneys, the witnesses said.

Witnesses said questions

*Turn to Larkin, page 7, col. 6*

*Larkin*

# Abortionist-Doctor Absent as State Hearing Nears End

*From page 1*

from the board and Asst. Atty. Gen. LeRoy L. Dalton focused on sanitary conditions at Larkin clinics the alleged use of pseudonyms by doctors and the type of counseling provided patients.

Linda Majchszak, 2754 N. Hackett Ave., who said she worked in the fall of 1971 in Larkin's former clinic at 710 N. Plankinton Ave., said she told the board she knew Larkin personally only as "Dr. Johnson."

Miss Majchszak told a reporter that all blood and fetuses were washed down the drain of one sink at that clinic. She said surgical instruments were sterilized in a machine.

A secretary for Towne Realty, which leased space to Larkin for the Plankinton Ave. clinic and which currently is leasing space for his Biogenetics clinic, at 710 N. 6th, said Larkin's 1971 lease was signed "Dr. Johnson."

The secretary, Janette Wilkum, said Larkin kept doors to the Plankinton Ave. clinic padlocked and brought in his own cleaning crew. She said reception rooms at the clinic "were in excellent condition" and that Larkin said the regular building

building maintenance people would not do a thorough enough cleaning job.

Both reporters who had been subpenaed told a reporter that the board asked them to verify under oath information in published stories.

Miss Nina Bernstein, of The Milwaukee Journal, and Mary Zahn (Mrs. Mary Hanin) of The Milwaukee Sentinel, said they were asked no questions that would have compromised the confidentiality of news sources.

The Rev. Elinor Yeo, of Clergy Consultation, said the board asked the names of agencies that referred patients to Larkin. She said she had traced "a number of ads in the paper which all led to his doorstep."

Larkin's attorney, Robert Friebert, who was present during the hearing, refused comment. He denied that a hearing regarding Larkin was taking place. Asked about Larkin's whereabouts, Friebert laughed.

One physician reportedly testified Friday morning. A doctor and a nurse, former Larkin associates, were expected to testify in the afternoon, according to Irvin.

**DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS. Filed July 12, 1973. [Document No. 7]**
**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

NOTICE OF MOTION

To: Robert H. Friebert
Plaintiff's Attorney
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203

PLEASE TAKE NOTICE that the undersigned will bring a motion to dismiss the action on for hearing before this court at a date, time, and location to be determined and fixed by order of the court.

ROBERT W. WARREN
Attorney General of Wisconsin

/s/ Le Roy L. Dalton
LEROY L. DALTON
Assistant Attorney General
of Wisconsin

Attorneys for Defendants

MOTION TO DISMISS

Come now the defendants, Harold Withrow, Thomas Henney, A. J. Sanfelippo, John M. Irvin, J. W. Rupel, A. L. Freedman, Mark T. O'Meara, and Thomas W. Tormey, by their attorneys, Robert W. Warren, Attorney General of the State of Wisconsin, and LeRoy L. Dalton, Assistant Attorney General of the State of Wisconsin, and move the court to dismiss the entitled matter for failure to state a cause of action within the meaning of 42 U.S.C. 1983 or any other federal

statute or any provisions of the Constitution of the United States for the reason that it shows upon the face of the complaint filed herein that the plaintiff has:

(1) Failed to identify a State of Wisconsin statute which allegedly violates plaintiff's constitutional rights;

(2) Failed to allege facts which would constitute a substantial federal question.

Dated at Madison, Wisconsin, this 11th day of July, 1973.

ROBERT W. WARREN
Attorney General of Wisconsin

/s/ Le Roy L. Dalton
LE ROY L. DALTON
Assistant Attorney General
of Wisconsin

Attorneys for Defendants

**ORDER DENYING MOTIONS FOR TEMPORARY RESTRAINING ORDER AND LEAVE TO COMMENCE TAKING DEPOSITIONS; BRIEFS ORDERED ON MOTION FOR PRELIMINARY INJUNCTION.**
**Filed July 13, 1973. [Document No. 8]**
**[Title omitted in printing.]**

ORDER

The court has examined the complaint, motion for temporary restraining order and preliminary injunction, and motion for leave to take depositions prior to the expiration of thirty days which have been filed in this action. I do not believe that the facts alleged in the complaint are sufficient to warrant granting the latter motion or that portion of the former motion



seeking a temporary restraining order. The parties will be given an opportunity to present authorities with respect to the preliminary injunction application.

Therefore, IT IS ORDERED that the plaintiff's motions for a temporary restraining order and leave to commence taking depositions be and hereby are denied.

IT IS FURTHER ORDERED that the plaintiff shall have until July 23, 1973 to serve and file a brief in support of his motion for preliminary injunction; the defendants shall have until August 3, 1973 to serve and file a brief in opposition; and the plaintiff shall have until August 8, 1973 to serve and file a brief in reply.

Dated at Milwaukee, Wisconsin, this 13 day of July, 1973.

/s/Myron L. Gordon
U. S. District Judge

**ORDER DENYING TEMPORARY RESTRAINING ORDER. Filed July 18, 1973. [Document No. 9]**
**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ORDER

In an order dated July 13, 1973, I denied the plaintiff's motion for a temporary restraining order and his motion for leave to commence discovery. A briefing schedule on the plaintiff's motion for preliminary injunction was established.

The defendants have moved to dismiss the action for failure to state a claim. The plaintiff, however, has filed an amended complaint, a new motion for a temporary restraining order and

preliminary injunction, and a motion to convene a three-judge court.

The request for a temporary restraining order will again be denied. The briefing schedule established for the original motion for a preliminary injunction will remain in effect for the new motion. Consideration of the plaintiff's application for the convening of a three-judge court will await determination of the issues raised by the other motions.

The plaintiff's amended complaint appears to correct at least part of the deficiency asserted in the defendants' motion to dismiss; however, I will treat that motion as applicable to the amended complaint if the defendants so wish. Although a memorandum was filed with the motion, that action was taken on fairly short notice; I believe the defendants should have an opportunity to develop their arguments more fully. Of course, the defendants may file a new motion to dismiss or elect not to proceed at all in that manner if they choose.

Therefore, IT IS ORDERED that the plaintiff's motion for a temporary restraining order be and hereby is denied.

IT IS FURTHER ORDERED, in the event the defendants elect to proceed on their original motion to dismiss, that the parties serve and file any briefs they wish to submit with respect to that motion as follows:

The defendants shall have until July 28, 1973, for a supporting brief; the plaintiff shall have until August 8, 1973, to answer; and the defendants shall have until August 13, 1973, to reply. If the defendants wish to file a new motion to dismiss, it should be filed, with a supporting brief, by July 28, 1973; in that event, the rest of the briefing schedule will remain unchanged.



Dated at Milwaukee, Wisconsin, this 18th day of July, 1973.

/s/ Myron L. Gordon
U. S. District Judge /s/ TSJ

## AFFIDAVIT OF ROBERT H. FRIEBERT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

**Filed July 24, 1973. [Document No. 10]**
**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN )
) SS.
MILWAUKEE COUNTY )

ROBERT H. FRIEBERT, being first duly sworn, on oath, deposes and says:

1. That he is the attorney for the plaintiff, DR. DUANE LARKIN.

2. Attached to this Affidavit is a copy of a letter received by your affiant on July 20, 1973 from the attorney for the defendants.

3. This Affidavit is made in support of the Motion for a Preliminary Injunction.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT

[Jurat omitted in printing.]

[Letterhead omitted in printing.]

July 19, 1973

Mr. Robert H. Friebert
Attorney at Law
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203

Dear Mr. Friebert:

Re: *In the Matter of the Investigation of the Practices of DUANE LARKIN, M.D., Licensee*

I have your letter of July 16, 1973, with the enclosures. I have responded to your affidavit by sending a letter to Judge Gordon, a copy of which is attached hereto.

I am somewhat disturbed by your tactic of including alleged facts and argument in letters to me and sending copies to Judge Gordon where you have an application pending for a preliminary injunction in his court.

I am especially disturbed by the misstatements and partial statements implying that the subject matter of the hearing is several years old and that any objectionable practices have long ago been abandoned.

I don't know how you could sit through the hearings and help but know that the total subject matter of Dr. Larkin's practice in Milwaukee is less than two years old and that witnesses testified about events occurring in 1972 and 1973. If your motivation is to attempt to influence Judge Gordon by these misstatements, I think it is reprehensible.

As to the statutory provisions which your client may or may not have violated, I suggest that you examine the various provisions of ch. 448 of the statutes dealing with the conduct of licensed physicians.



As you were advised previously, if Dr. Larkin wishes to come before the Board and explain any of the evidence which has been presented, he will be allowed to do so at the adjourned investigative hearing.

Very truly yours,

/s/ Le Roy L. Dalton
LeRoy L. Dalton
Assistant Attorney General

LLD:up

**AMENDED MOTION TO DISMISS.**
**Filed July 30, 1973. [Document No. 13]**
**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

COME NOW the defendants, Harold Withrow, Thomas Henney, A. J. Sanfelippo, John M. Irvin, J. W. Rupel, A. L. Freedman, Mark T. O'Meara, and Thomas W. Tormey, Jr., by their attorneys, Robert W. Warren, Attorney General of the State of Wisconsin, and LeRoy L. Dalton, Assistant Attorney General of the State of Wisconsin, and move the court to dismiss the entitled matter for failure to state a cause of action within the meaning of 42 U.S.C. §1983 or any other federal statute or any provisions of the Constitution of the United States for the reason that it shows upon the face of the amended complaint filed herein that the plaintiff has:

(1) Failed to allege facts which would constitute a substantial federal constitutional question; all within the meaning of Rule 12 (b) (1) and 12 (b) (6), Federal Rules of Civil Procedure.

(2) Failed to show that any alleged constitutional rights will not be protected before the Medical Examining Board and any subsequent court proceedings.

Dated at Madison, Wisconsin, this 27th day of July, 1973.

ROBERT W. WARREN
Attorney General of Wisconsin

/s/ Le Roy L. Dalton
LE ROY L. DALTON
Assistant Attorney General

Attorneys for Defendants

**AFFIDAVIT OF ROBERT H. FRIEBERT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.**
**Filed July 30, 1973. [Document No. 14]**
**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROBERT H. FRIEBERT, being first duly sworn, on oath, deposes and says:

1. That he is the attorney for the plaintiff, DR. DUANE LARKIN.

2. Attached hereto are copies of newspaper articles which appeared in The Milwaukee Journal on Thursday, July 26, 1973 and which disclose the content of the Motion filed under Rule 36 and also disclose a quote from one of the defendants, DR. TORMEY, to the effect that it is the position of the Medical Examining Board in a case involving another doctor not to make public statements.



3. That this Affidavit is made in support of the Motion for a Temporary Restraining Order and Preliminary Injunction.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT

[Jurat omitted in printing.]

MILWAUKEE JOURNAL

July 26, 1973

# State Says Abortionist Used Alias

By Nina Bernstein
of The Journal Staff

The State Medical Examining Board filed a list of allegations concerning abortionist Dr. Duane Larkin in Federal Court Thursday and asked that he agree that they are accurate.

The allegations include:

That Larkin used the name Dr. Glen Johnson to sign a lease for his abortion clinic, formerly at 710 N. Plankinton Ave., and the same pseudonym in his medical practice during September, 1971.

State law forbids doctors to practice medicine under assumed names.

That he knowingly employed physicians in his clinic who used pseudonyms, some

*Turn to Larkin, page 12, col. 1*

*Larkin*

# Abortionist Used Alias, Board Says

*From page 1*

of whom were not licensed to practice medicine in Wisconsin.

That an abortion referral agency, known at different times as Wisconsin Family Planning, Haven Midwest and Women's Medical Group, has received 20% of Larkin's abortion fees on patients referred to him by the agency.

The action Thursday was filed in connection with a Federal Court lawsuit begun July 6 by Larkin to try to halt an investigation into his practices by the examining board. Federal Judge Myron L. Gordon denied a request for an immediate halt to the board's examination, and the suit is still pending.

The requested stipulations are part of normal court procedure, in which both parties in a suit try to agree on certain issues before the trial and thus limit court time to disputed facts.

### Hearing Underway

The examining board, which is a medical licensing and regulatory body, is conducting the

*Dr. Duane Larkin*

hearing to determine whether Larkin has engaged in conduct unbecoming a person licensed to practice medicine in Wisconsin or detrimental to the best interests of the public.

Larkin, a Michigan resident, has operated an abortion clinic in Milwaukee since 1971.

According to the papers filed Thursday, Larkin hired Dr. Krisha Murthy to treat patients at the clinic although Murthy's temporary educational permit limited his medical activities to graduate training at Mount Sinai Medical Center.

Another doctor treating patients at the clinic, Dr. Young W. Ahn, was not licensed to practice medicine in Wisconsin, according to the board.

### 3 Pseudonyms Cited

Three doctors employed by Larkin between September, 1971, and February, 1973, used the pseudonym Dr. Park, Dr. Rhee and Dr. Kamon, the papers said.

Since Feb. 1, 1973, the papers said, Larkin has employed Dr. Benjamin M. Victoria Jr. to perform abortions, paying him 18% of the fee paid by the patient in cash each Saturday.

Neither Larkin nor his attorney, Robert Frieberg, could be reached for comment.

THE MILWAUKEE JOURNAL

Thursday, July 26, 1973

# Doctors Ask Publicity of Reprimands

Madison, Wis. –AP– The State Medical Society of Wisconsin criticized the Wisconsin Medical Examining Board Wednesday for not publicizing the board's reprimand of a Madison neurosurgeon, Dr. Henry M. Suckle.

"When disciplinary action against a member of the profession is warranted, we believe the action should be undertaken in such a way as to protect the public, not the physician," the society's secretary, Earl R. Thayer, said in a letter written at the direction of its Board of Directors.

"Thus a public reprimand should be widely disseminated, immediately," said the letter to Dr. Thomas W. Tormey, executive secretary of the board.

The board decided June 19 to "publicly" reprimand Suckle as a result of a complaint filed by the Dane County Medical Society last year, but the board did not tell newsmen.

The story came out about a week later, after a source told the Madison Capital Times and the newspaper had a reporter confirm it.

"We don't promote trouble in our profession," Tormey told a reporter when asked to explain the silence.

**AFFIDAVIT OF ROBERT H. FRIEBERT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.**

**Filed September 20, 1973. [Document No. 18]**

**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN )
) SS.
MILWAUKEE COUNTY )

ROBERT H. FRIEBERT being first duly sworn, on oath, deposes and says that:

1. He is the attorney for the plaintiff DUANE LARKIN, M.D.

2. Attached to this Affidavit is a copy of a Notice of Contested Hearing which Notice indicates that the defendants in the above entitled action have scheduled a hearing on October 4, 1973 with respect to the plaintiff and, the defendants will determine at that time whether to suspend the license of the plaintiff pursuant to the provisions of Sec. 448.18 (7), Wis. Stats.

3. This Affidavit is made in support of a Motion for a Temporary Restraining Order and Preliminary Injunction.

Dated at Milwaukee, Wisconsin this 20th day of September, 1973.

/s/ Robert H. Friebert
Robert H. Friebert

[Jurat omitted in printing.]



STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
MEDICAL EXAMINING BOARD

| | |
|---|---|
| In the Matter of the Alleged Unprofessional Conduct of DUANE LARKIN, M.D., Licensee. | NOTICE OF CONTESTED HEARING |

---

To: Duane Larkin, M.D.
536 West Wisconsin Avenue
Milwaukee, Wisconsin

TAKE NOTICE that a contested hearing will be held on the Board's own motion on October 4, 1973, at 1:30 p.m., or as soon thereafter as counsel can be heard, in Room 252 of the new State Office Building, 201 East Washington Avenue, Madison, Wisconsin, to determine whether the licensee has practiced medicine in the State of Wisconsin under any other Christian or given name or any other surname than that under which he was originally licensed or registered to practice medicine in this state, which practicing has operated to unfairly compete with another practitioner, to mislead the public as to identity, or to otherwise result in detriment to the profession or the public, and more particularly, whether the said Duane Larkin, M.D., has practiced medicine in this state since September 1, 1971, under the name of Glen Johnson.

TAKE FURTHER NOTICE that the Board will also hear evidence to determine whether the licensee has permitted persons to practice medicine in this state in violation of sec. 448.02 (1), Stats., more particularly whether the said Duane Larkin, M.D., permitted Young Wahn Ahn, M.D., an unlicensed physician, to perform abortions at his abortion clinic during the year 1972.

TAKE FURTHER NOTICE that the Board will also hear evidence to determine whether the said Duane Larkin, M.D., split fees with other persons during the years 1971, 1972, and 1973 in violation of sec. 448.23 (1), Stats.

Based on the evidence adduced at said contested hearing, the Medical Examining Board will determine whether to suspend the license of the said Duane Larkin, M.D., under the authority of sec. 448.18 (7), Stats.

Dated at Madison, Wisconsin this 18 day of September, 1973.

MEDICAL EXAMINING BOARD

By: /s/ Thos. W. Tormey, Jr., M.D.
Thos. W. Tormey, Jr., M.D., Secretary

**MOTION FOR TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY INJUNCTION.**
**Filed September 27, 1973. [Document No. 19]**
**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The plaintiff, by his attorney Robert H. Friebert, hereby moves the court pursuant to Rule 65 of the Federal Rules of Civil Procedure and pursuant to the provisions of 28 U.S.C. Sec. 2284 (3) for a temporary restraining order and an interlocutory injunction against the defendants, their agents, servants, employees, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors restraining and enjoining them from proceeding with the contested hearing scheduled to commence on October 4, 1973 and from in any way enforcing the provisions of Sec. 448.18 (7), Wis. Stats. against the plaintiff or any of the plaintiff's employees,



agents, servants, attorneys or persons in active concert or participation with them on the grounds that the holding of this hearing and the enforcement of the provisions of Sec. 448.18 (7), Wis. Stats. will irrevocably harm the plaintiff as is more fully set forth in the affidavits and briefs previously filed herein.

Dated this 26th day of September, 1973.

/s/ Robert H. Friebert
Robert H. Friebert

**DECISION AND ORDER, GRANTING REQUEST FOR THREE-JUDGE COURT, DENYING MOTION TO DISMISS, AND GRANTING TEMPORARY RESTRAINING ORDER.**
**Filed October 1, 1973. [Document No. 20]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

---

DUANE LARKIN, M.D.,
Plaintiff,

v.

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A. J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin.
Defendants.

Case No. 73-C-360

---

DECISION AND ORDER

The plaintiff, a licensed physician who performs abortions in this state, brought this action against the members of the state medical examining board for injunctive relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343.

The complaint alleged that an investigative hearing had been initiated concerning Dr. Larkin, but that the notice thereof failed to disclose any specific allegations of misconduct. It was further alleged, upon information and belief, that the investigation was launched in order to punish the plaintiff for performing abortions.

A motion for a temporary restraining order, filed with the complaint, was denied. I concluded that the plaintiff's complaint was insufficient to justify interference with the examining board's attempt to perform its statutory investigative duty. The plaintiff was given the opportunity, however, to submit memoranda with respect to his motion for a preliminary injunction.

Following a motion to dismiss filed by the defendants, the plaintiff amended his complaint to challenge the constitutionality of the statutes authorizing the examining board to act. A request to convene a three-judge court and a motion for a temporary restraining order or preliminary injunction were also filed. The defendants amended their motion to dismiss so as to make it applicable to the amended complaint.

The plaintiff's motion for a temporary restraining order was again denied. Although I believed then, as I do now, that there is a serious question as to the validity of legislation which allows an examining board both to rule on *and* to punish for charges evolving from its own investigation, that



question was not presented at that time. The challenge was only to the activity then being engaged in by the board, which was investigation.

Again, however, the plaintiff was given the opportunity to submit authorities in support of his position, and the defendants were allowed to brief the motion to dismiss. It was anticipated that the arguments presented by the parties would also be helpful toward resolving the question of whether a three-judge court was required.

Since that time, the status of this action has changed radically. The board is no longer engaged in an investigative proceeding, for it has notified the plaintiff that it has scheduled a "contested hearing" at which it will determine whether his license should be temporarily suspended. The board's current action makes all allegations of the plaintiff's amended complaint germane. The positions of the parties can no longer be assessed in terms of a limited challenge involving only investigative proceedings; the board's present action calls into play all challenges to the statutory scheme as detailed in the plaintiff's complaint.

The first inquiry must be whether to request the convening of a three-judge court. Literature, Inc. v. Quinn, — F. 2d — (1st Cir., Case number 73-1074, decided July 26, 1973). That inquiry is limited to "whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." Idlewild Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962). Since the same issues are involved, that inquiry should also resolve a motion to dismiss.

The prayer of the amended complaint seeks a declaration of unconstitutionality of sections 448.17 and 448.18 of the

Wisconsin statutes. It also seeks injunctive relief with respect to those statutes. Clearly a formal basis for equitable relief is stated, and the case comes within the requirements of 28 U.S.C. §2281, *et seq.* The question then is whether the constitutional claim is substantial.

Procedural due process provisions are required in instances where a person stands to see significant interference with his property rights or his liberty. Board of Regents v. Roth, 408 U.S. 564 (1972). Interference with a physician's ability to practice his profession would surely qualify as an interference with a property right. It is certainly "a sufficiently direct threat of personal detriment". Doe v. Bolton, 410 U.S. 179, 188 (1973). Suspension of his license to practice medicine, as the result of charges of improper conduct, presumptively has a serious adverse effect on the physician's reputation. Thus, it is clear that the plaintiff's liberty is also at stake. 408 U.S. at 573. "There is little doubt but that a person's interest in his reputation is sufficient to trigger procedural due process protection." Suarez v. Weaver, — F. 2d — (7th Cir., Case number 72-1656, decided September 14, 1973). *See also* Wisconsin v. Constantineau, 400 U.S. 433 (1971); and Weiman v. Updegraff, 344 U.S. 183 (1952).

The issue then becomes narrowed to whether an arguably meritorious question exists with respect to whether the provisions of sections 448.17 and 448.18 of the Wisconsin statutes satisfy due process requirements.

Section 448.17 gives the board authority to "investigate, hear and act upon practices by persons licensed to practice medicine and surgery. . . ." It also provides that the board, following investigation, may warn, reprimand, or institute



criminal or revocation proceedings. Section 448.18 concerns the procedures for revocation of a physician's license. Although revocation, like a criminal proceeding, can only be accomplished through an action prosecuted by a district attorney, temporary suspension may be ordered by the board itself. Section 448.18 (7) provides that a physician's license may be suspended, for up to two consecutive three-month periods, "without formal proceedings . . . where he is known or the examining board has good cause to believe" that he has violated another subsection of the statute defining proscribed conduct.

In several cases involving hearings required by due process, the Supreme Court has delved into the area of minimal requirements. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the court reaffirmed the principle of Morrissey v. Brewer, 408 U.S. 471 (1972), that one of the minimum elements of such hearings is "an independent decisionmaker". 411 U.S. at 786. Under sections 447 and 448, it appears that the examining board is authorized not only to investigate physicians and present charges, but to rule on those charges and impose punishment, at least to the extent of reprimanding or temporarily suspending. The latter sanction is the one now threatening the plaintiff, and, since it may occur without the intervention of an independent neutral and detached decisionmaker, I find that the plaintiff has raised at least one substantial constitutional question. Other issues are also presented; however, only one such issue need be assessed as not insubstantial in order to warrant invocation of a three-judge court. Thus, I do not reach the plaintiff's other challenges.

The defendants suggest that there is no real problem presented here, because any action taken by the board is

subject to review pursuant to chapter 227 of the Wisconsin statutes. It should be noted, however, that the plaintiff is challenging the propriety of the board's statutory authority; review statutes deal only with the propriety of the *exercise* of authority. Furthermore, the defendants' argument really presents an issue of abstention, and the resolution of that matter, at least on the facts of this case, should await determination by the three-judge court. See Goosby v. Osser, 409 U.S. 512, 522-23 (1973); Literature, Inc. v. Quinn, — F. 2d — (1st Cir., Case number 73-1074, decided July 26, 1973).

I conclude, therefore, that the plaintiff's motion to request the convening of a three-judge court should be granted. The request will be forwarded to the chief judge of this circuit upon filing of this decision and order. It follows that the motion to dismiss will be denied.

Since I am requesting a three-judge court, resolution of the plaintiff's motion for a preliminary injunction should be made by the panel. The plaintiff has renewed his motion for a temporary restraining order, and such motion will now be granted. The motion seeks to enjoin the defendants from proceeding with the contested hearing and from attempting temporarily to suspend the plaintiff's license pursuant to section 448.18 (7). I believe that the likelihood of success of the plaintiff's challenge and the threat of irreparable harm following from suspension, coupled with the lack of prejudice to the defendants, justify preserving the status quo until the three-judge court is prepared to act.

Therefore, IT IS ORDERED that the defendants' motion to dismiss the action be and hereby is denied.



IT IS ALSO ORDERED that the plaintiff's motion for a temporary restraining order be and hereby is granted. The defendants are hereby enjoined from proceeding with the contested hearing involving the plaintiff herein, currently scheduled for October 4, 1973, and are also enjoined from attempting to enforce the provisions of §448.18 (7), Wis. Stats., against the plaintiff, all until further order of the court.

Dated at Milwaukee, Wisconsin, this 1st day of October, 1973.

/s/Myron L. Gordon
U. S. District Judge

**MOTION FOR TEMPORARY RESTRAINING ORDER WITH SUPPORTING AFFIDAVIT.**
**Filed October 3, 1973. [Document No. 21]**
**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The plaintiff, by his attorney Robert H. Friebert hereby moves the court for the entry of an order restraining the defendants from conducting any further proceedings against the plaintiff, pursuant to the Notice dated June 20, 1973 (Exhibit B to Amended Complaint) and from enforcing the provisions of Sec. 448.17, Wis. Stats. on the grounds that the Notice and statute subject the plaintiff to the possibility of punishment by warning or reprimand in violation of the Constitution as alleged in the Amended Complaint.

/s/Robert H. Friebert,
Attorney for Plaintiff

[Title omitted in printing.] AFFIDAVIT

STATE OF WISCONSIN )
) SS.
MILWAUKEE COUNTY )

ROBERT H. FRIEBERT, being first duly sworn, on oath, deposes and says that:

1. He is the attorney for the plaintiff Duane Larkin, M.D. in the above captioned case.

2. Your affiant was notified today by Leroy Dalton, Assistant Attorney General and the attorney for the defendants in the above captioned case that the defendants intend to continue another hearing scheduled for October 4, 1973 which hearing is designated the "investigative hearing" brought pursuant to Sec. 448.17, Wis. Stats. thereby subjecting the plaintiff to the possible penalty of warning or reprimand (see Exhibit B to Amended Complaint) and, your affiant was also advised that the defendants do not consider the decision and order entered by the court on October 1, 1973 to bar them from proceeding with the "investigative hearing". Your affiant was also advised that the defendants will not conduct a "contested hearing" to enforce Sec. 448.18 (7), Wis. Stats.

3. This Affidavit is made to advise the court on the present status of the case and in support of a motion for temporary restraining order.

Dated at Milwaukee, Wisconsin, this 3rd day of October, 1973.

/s/ Robert H. Friebert
Robert H. Friebert

[Jurat omitted in printing.]



**AFFIDAVIT OF ROBERT H. FRIEBERT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.**
**Filed October 29, 1973. [Document No. 23]**
**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN )
) SS.
MILWAUKEE COUNTY )

ROBERT H. FRIEBERT, being first duly sworn, on oath, deposes and says that:

1. He is the attorney for the plaintiff, DR. DUANE LARKIN, in the above captioned case.

2. Attached is a copy of the Findings of Fact, Conclusions of Law and Decision of the defendants dated October 5, 1973.

3. The evidence at the hearings which were held on July 12 and 13, 1973 and October 4, 1973 discloses the following facts:

(a) Dr. Ik Hak Bae is a doctor of medicine licensed to practice medicine in Wisconsin.

(b) Dr. Krishna Murthy did not perform abortions at the plaintiff's clinic.

(c) Dr. Young Whan Ahn is a doctor who is licensed to practice medicine in the State of Georgia and was so licensed in the fall of 1972; upon information and belief, Dr. Ahn at all times was a doctor of medicine who was licensed to practice medicine in the Republic of South Korea.

(d) Dr. Benjamin Victoria is a doctor of medicine who is licensed to practice medicine in the State of Wisconsin.

(e) Dr. Larkin was present in the clinic at all material times when Dr. Ahn actually performed abortions.

(f) Dr. Ahn would perform abortions a few days a week in conjunction with Dr. Larkin.

4. This Affidavit is made in support of a Motion for a Preliminary Injunction.

Dated this 23rd day of October, 1973.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT

[Jurat omitted in printing.]

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
MEDICAL EXAMINING BOARD

| | |
|---|---|
| In the Matter of the Investigation of the Practices of DUANE R. LARKIN, M.D., Licensee. | FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION |

The Medical Examining Board, having conducted an investigative hearing and having heard testimony and evidence concerning the medical and surgical practices of Duane R. Larkin, M.D., on July 12 and 13 and October 4, 1973, in accordance with sec. 448.17, Stats., now makes the following

FINDINGS OF FACT

(1) That Duane R. Larkin, M.D., hereafter called the licensee, is a resident of Livonia, Michigan.



(2) That the licensee was granted license number 17697 by reciprocity with the State of Michigan to practice medicine and surgery in the State of Wisconsin on or about August 17, 1971, and that thereafter he opened an office for the practice of medicine, specializing in the performance of abortions, at 710 North Plankinton Avenue and 710 North Sixth Street, Milwaukee, Wisconsin.

(3) From on or about August 17, 1971, until on or about April 25, 1972, the licensee rented quarters and subsequently practiced medicine and surgery at 710 North Plankinton Avenue, Milwaukee, Wisconsin, under a name other than that for which he was originally licensed to practice medicine and surgery in the State of Wisconsin, to wit: Glen Johnson, and that such conduct operated to mislead the public as to his identity.

(4) From on or about August 17, 1971, until on or about May 25, 1973, the licensee counseled and advised doctors employed by him at his abortion clinic at both of the above addresses in Milwaukee, Wisconsin, to use names other than the names under which they were originally licensed to practice medicine and surgery in Wisconsin, to wit:

(a) Dr. Ik Hak Bae to use the name Dr. Rhee,

(b) Dr. Krishna Murthy, an unlicensed doctor holding a temporary educational certificate, to use the name Dr. Reamon or Ramon,

(c) Dr. Young Whan Ahn, an unlicensed doctor, to use the name Dr. Park,

and that such conduct operated to mislead the public as to the identity of the doctors involved.

(5) From on or about August 17, 1971, to on or about February 27, 1973, the licensee has split professional fees earned from abortions performed at the above addresses with Robert C. Moore of Detroit, Michigan, operator of Haven Midwest, an abortion referral agency, in payment for the patients solicited by Robert C. Moore and referred to the licensee for abortions; that the licensee had similar arrangements with other referral agencies and other individuals.

(6) That between on or about August 17, 1971, and on or about February 27, 1973, the licensee employed unlicensed persons to engage in the practice of medicine and surgery, including a Dr. Young Whan Ahn and Dr. Krishna Murthy, an unlicensed doctor holding a temporary educational certificate which limited his practice to medical training at Mount Sinai Hospital, Milwaukee, Wisconsin.

(7) That between on or about August 17, 1971, and on or about September 30, 1973, the licensee has split fees with Dr. Benjamin Victoria, Dr. Ik Hak Bae, Dr. Krishna Murthy, and Dr. Young Whan Ahn and has failed to render individual statements or accounts of his charges to patients for services of himself and other physicians.

## CONCLUSIONS OF LAW

(1) That in practicing medicine and surgery under the name Glen Johnson the licensee was engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public, within the meaning of sec. 448.18 (1) (g), Stats.

(2) That in counseling and advising doctors employed by him at his abortion clinic to use names other than the names under which they were originally licensed to practice medicine and surgery in Wisconsin, the licensee has engaged in conduct



unbecoming a person licensed to practice or detrimental to the best interests of the public, within the meaning of sec. 448.18 (1) (g), Stats.

(3) That in splitting fees with referral agencies such as Haven Midwest and with other doctors, there is probable cause to believe that the licensee has violated the provisions of sec. 448.23 (1), Stats., and has engaged in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public within the meaning of sec. 448.18 (1) (g), Stats.

(4) That in permitting unlicensed persons to practice medicine and surgery there is probable cause to believe that the licensee has violated secs. 448.02 (1) and 939.05 (2) (c), Stats., and has engaged in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public within the meaning of sec. 448.18 (1) (g), Stats.

## DECISION

Within the meaning of sec. 448.17, Stats., it is hereby determined that there is probable cause to believe that the licensee has violated the criminal provisions of ch. 448, Stats., and that there is probable cause for an action to revoke the license of the licensee for engaging in unprofessional conduct.

Therefore, it is the decision of this Board that the secretary verify this document and file it as a verified complaint with the District Attorney of Milwaukee County in accordance with sec. 448.18 (2), Stats., for the purpose of initiating an action to revoke the license of Duane R. Larkin, M.D., to practice medicine and surgery in the State of Wisconsin and

initiating appropriate actions for violation of the criminal laws relating to the practice of medicine.

BY THE BOARD:

/s/ Thos. W. Tormey, Jr., M.D.
Thos. W. Tormey, Jr., M.D., Secretary

[Jurat omitted in printing.]

**ANSWER OF DEFENDANTS TO AMENDED COMPLAINT.**
**Filed November 1, 1973. [Document No. 24]**
**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

COME NOW the defendants by their attorneys, Robert W. Warren, Attorney General of the State of Wisconsin, and LeRoy L. Dalton, Assistant Attorney General of the State of Wisconsin, and for an answer to the amended complaint served and filed herein ADMIT, DENY, and ALLEGE as to each paragraph of the amended complaint as follows:

FIRST CAUSE OF ACTION

Paragraph 1. DENY same.

Paragraph 2. ADMIT same.

Paragraph 3. ADMIT same.

Paragraphs 4 through 17. ADMIT same.

Paragraph 18. DENY same.

Paragraph 19. DENY same.



Paragraph 20. DENY same.

Paragraph 21. DENY same.

Paragraph 22. ADMIT that the Honorable James E. Doyle, District Judge, Western District of Wisconsin, restrained the Board from enforcing the abortion statute against Dr. Alfred Kennan. ALLEGE that Judge Doyle did not restrain the Board from investigating the medical and surgical practices of Dr. Alfred Kennan.

SECOND CAUSE OF ACTION

Paragraph 1. Defendants ADMIT, DENY, and ALLEGE as in the first cause of action.

Paragraph 2. DENY same.

Paragraph 3. ADMIT the first sentence thereof. DENY the second sentence thereof.

WHEREFORE, the defendants demand judgment as follows:

1. The action be dismissed, or

2. That judgment be entered declaring the procedures employed by the defendants as members of the Medical Examining Board of the State of Wisconsin embodied in the notice of investigative hearing, secs. 448.17 and 448.18, Wis. Stats., to be constitutional and in violation of no constitutional rights.

3. That judgment be entered declaring that the actions of the defendants as applied to the plaintiff are constitutional and in violation of no rights guaranteed to the plaintiff under the Constitution of the United States.

4. That judgment be entered declaring that the notice of contested hearing dated September 18, 1973, issued by the Board to Duane Larkin, M.D., and sec. 448.18 (7), Wis. Stats.,

are constitutional and not in violation of any rights guaranteed to the plaintiff by the United States Constitution.

5. That the defendants recover their costs.

6. For such other and further relief as the court may deem appropriate and proper.

Dated at Madison, Wisconsin, this 31st day of October, 1973.

ROBERT W. WARREN
Attorney General of Wisconsin

/s/ LeRoy L. Dalton
LE ROY L. DALTON
Assistant Attorney General

Attorneys for Defendants

**AFFIDAVIT OF LE ROY L. DALTON IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION.**
**Filed November 2, 1973. [Document No. 26]**
**[Title omitted in printing.]**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN )
) SS.
COUNTY OF DANE )

LeRoy L. Dalton, Assistant Attorney General, being first duly sworn, on oath deposes and says:

(1) That he is the attorney for the defendants in this action.



(2) That he attended the hearings before the Medical Examining Board on July 12 and 13 and October 4, 1973, heard the testimony, and has reviewed all transcripts of testimony excepting three witnesses who testified on October 4.

(3) That this affidavit is made for the purpose of advising the court as to your affiant's understanding of the evidence produced at the above hearings, as follows:

(a) Dr. Krishna Murthy did not perform abortions but did engage in acts constituting the practice of medicine within the meaning of ch. 448 of the Wisconsin Statutes.

(b) Dr. Young Whan Ahn worked at Dr. Larkin's abortion clinic from late 1971 until January or February of 1973. During that period of time he was not licensed to practice medicine in Wisconsin and the evidence in the record indicates that he was not licensed to practice medicine anywhere until November of 1972 when he received a license from the State of Georgia. The evidence does indicate that he graduated from Kyung-Pook University Medical College in Korea, but there is no evidence that he was ever licensed to practice medicine in that country.

(c) There is direct testimony from a Mrs. Carlene Carr that Dr. Larkin was not present in the clinic at all material times when Dr. Ahn actually performed abortions.

(d) To state that Dr. Ahn would perform abortions a few days a week in conjunction with Dr. Larkin is to completely mislead the court as to the nature of Dr. Larkin's operation, which consisted mostly of Friday, Saturday, and Sunday work. The testimony clearly indicates that

Dr. Larkin commuted between Detroit and Milwaukee and spent only weekends in Milwaukee. Dr. Ahn was identified by more than one witness as the principal abortionist in the clinic. The testimony indicates that by far he performed more abortions than any other person, including Dr. Larkin.

(e) The testimony indicates that Dr. Larkin does not regularly perform abortions at his clinic anymore; that he has been in Milwaukee only once since about February, 1973, and has Dr. Benjamin Victoria employed at a percentage of the gross income of the clinic to perform the abortions.

(4) This affidavit is submitted in response to the affidavit of plaintiff's counsel and in opposition to the motion for a preliminary injunction.

Dated at Madison, Wisconsin, this 1st day of November, 1973.

/s/ Le Roy L. Dalton
LE ROY L. DALTON
Assistant Attorney General

Attorney for the Defendants
Room 114 East, State Capitol
Madison, Wisconsin 53702
Telephone: 608-266-3863

[Jurat omitted in printing.]

## DECISION OF THE THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN. Filed December 21, 1973. [Document No. 29]

This decision is printed in the Appendix to the Jurisdictional Statement at pages 2-4.



## JUDGMENT ON DECISION BY THE COURT. Filed January 31, 1974. [Document No. 33]

This judgment is printed in the Appendix to the Jurisdictional Statement at pages 4-5.

## NOTICE OF APPEAL. Filed March 1, 1974. [Document No. 35]

The notice of appeal is printed in the Appendix to the Jurisdictional Statement at pages 6-7.

# No. 73-1573

MAY

# In the
# Supreme Court of the United States

OCTOBER TERM, 1973

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HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A.J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin,

*Appellants,*

vs.

DUANE LARKIN, M.D.,

*Appellee.*

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## MOTION TO DISMISS OR AFFIRM AND APPELLEE'S APPENDIX

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ROBERT H. FRIEBERT
*Attorney for Appellee*

*Of Counsel:*
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UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60616 (312) 525-6561

# INDEX


PAGE

The State of Wisconsin Statutes Involved ..... 2

Question Presented for Review ..... 7

Statement of the Case ..... 8

Argument ..... 20

This Case Presents No Substantial Question Not Previously Decided By This Court ..... 20

Conclusion ..... 29

Appendix:

Findings of Fact and Conclusions of Law, and Decision of the State of Wisconsin Medical Examining Board ..... App. 1


## AUTHORITIES CITED

*Cases*


American Cyanide Company v. FTC, 363 F.2d 757 (6th Cir. 1966) ..... 22

Amos Treat & Co., Inc. v. SEC, 306 F.2d 260 (D.C. 1962) ..... 22

Babbitz v. McCann, 310 F.Supp. 293 (E.D. Wis. 1970), vac. on other grounds, 402 U.S. 903 (1971) ..... 8

Board of Regents v. Roth, 408 U.S. 564 (1972) ..... 21, 28

Bloom v. Illinois, 391 U.S. 194 (1968) ..... 23

Gagnon v. Scarpelli, 411 U.S. 778 (1973) ..... 22

Gibson v. Berryhill, 411 U.S. 564 (1973) ..... 25, 28

PAGE

Glass v. Mackie, 370 Mich. 482, 122 N.W.2d 651 (1963) .. 23

Hilboldt v. Wis. R. E. Brokers' Bd., 28 Wis.2d 474, 137 N.W.2d 482 (1965) ..... 24

In Re Murchison, 349 U.S. 133 (1955) ..... 23

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Kennan v. Nichol, 326 F.Supp. 613 (1971) *aff'd.*, 404 U.S. 1055 (1971) ..... 8

Kennan v. Warren, 328 F.Supp. 525 (1971) ..... 9

Larkin v. Bruce, 352 F.Supp. 1076 (E.D. Wis. 1972) .. 10

Larkin v. McCann, et al. No. 71-C-671 (E.D. Wis.) .... 9

Larkin v. Withrow, 368 F.Supp. 793 (E.D.Wis. 1973) ..18, 19

Mack v. Florida State Board of Dentistry, 296 F.Supp. 1259 (S.D. Fla. 1969), aff. and vac'd. 430 F.2d 862 (5th Cir. 1970); *cert. den.* 401 U.S. 954 (1971) ..... 22

Meyer v. Nebraska, 262 U.S. 390 (1923) .....21, 28

Morrissey v. Brewer, 408 U.S. 471 (1972) ..... 22

Offutt v. United States, 348 U.S. 11 (1954) ..... 23

Pickering v. Board of Education, 391 U.S. 563 (1968) 20, 28

State ex rel. Bruce v. Larkin, 346 F.Supp. 1065 (E.D. Wis. 1972) ..... 9

Texaco v. FTC, 336 F.2d 754 (D.C. 1964) ..... 23

Trans World Airlines v. CAB, 254 F.2d 90 (D.C. 1958) 22-23

Wasson v. Trowbridge, 382 F.2d 807 (2nd Cir. 1967) .. 21

Weiman v. Updegraff, 344 U.S. 183 (1952) ..... 28

Wisconsin v. Constantineau, 400 U.S. 433 (1971) ..... 28



*Other Authorities*

PAGE

28 U.S.C. § 2284(5) ..... 9

Rule 52(a), FRCP ..... 24

*Statutes*

Sec. 227.08, Wis. Stats. ..... 10

Sec. 448.02 Wis. Stats. ..... 25

Sec. 448.02 (1) Wis. Stats. ..... 25

Sec. 448.02 (4), Wis. Stats. ..... 24

Sec. 448.16, Wis. Stats. ..... 25

Sec. 448.18 (1)(b) Wis. Stats. ..... 25

Sec. 448.18 (7), Wis. Stats. ..... 14

Sec. 448.23 (1), Wis. Stats. ..... 26

Sec. 940.04, Wis. Stats. ..... 25

# In the
# Supreme Court of the United States

OCTOBER TERM, 1973

## No. 73-1573

**HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A.J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin,**

*Appellants,*

VS.

**DUANE LARKIN, M.D.,**

*Appellee.*

### MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the interlocutory judgment of the United States District Court for the Eastern District of Wisconsin on the grounds that it is clear that the questions are so unsubstantial as not to warrant further argument.

## THE STATE OF WISCONSIN STATUTES INVOLVED

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**§ 448.02 (1)**

No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery, or osteopathy, or any other system of treating the sick as the term "treat the sick" is defined in s. 445.01 (1) (a), without a license or certificate of registration from the examining board, except as otherwise specifically provided by statute.

**§ 448.02 (4)**

No person shall practice medicine, surgery or osteopathy, or any other system of treating bodily or mental ailments or injuries of human beings, under any other Christian or given name or any other surname than that under which he was originally licensed or registered to practice in this or any other state, in any instance in which the examining board, after a hearing, finds that practicing under such changed name operates to unfairly compete with another practitioner or to mislead the public as to identity or to otherwise result in detriment to the profession or the public. This subsection does not apply to a change of name resulting from marriage or divorce.

**§ 448.16 (1)**

Sections 448.02 to 448.08, shall not apply to commissioned physicians of the medical corps of one of the armed services or the federal health service of



the United States or to medical or osteopathic physicians of other states or countries in actual consultation with resident licensed practitioners of this state, nor to the gratuitous prescribing and administering of family remedies or to treatment rendered in an emergency.

**§ 448.17**

The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under s. 448.06, that are inimical to the public health. The examining board shall have the power to warn and to reprimand, when it finds such practice, and to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute, and the attorney general may aid the district attorney in the prosecution thereof.

**§ 448.18 (1)**

"Immoral or unprofessional conduct" as used in this section mean: (a) Procuring, aiding or abetting a criminal abortion; (b) advertising in any manner either in his own name or under the name of another person or concern, actual or pretended, in any newspaper, pamphlet, circular, or other written or printed paper or document the curing of venereal diseases, the restoration of "lost manhood", the treatment and curing of private diseases peculiar to men or women, or the advertising or holding himself out to the public in any manner as a specialist in diseases of the sexual organs, or diseases caused by sexual weakness, self-

abuse or excessive indulgences, or in any diseases of a like nature or produced by a like cause, or the advertising of any medicine or any means whatever whereby the monthly periods of women can be regulated or the menses reestablished, if suppressed, or being employed by or in the service of any person, or concern, actual or pretended so advertising; (c) the obtaining of any fee; or offering to accept a fee on the assurance or promise that a manifestly incurable disease can be or will be permanently cured; (d) wilfully betraying a professional secret; (e) indulging in the drug habit; (f) conviction of an offense involving moral turpitude; (g) engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public.

**§ 448.18 (2)**

(2) Upon verified complaint in writing to the district attorney charging the holder of a license or certificate of registration from the examining board or chiropractic examining board with having been guilty of immoral or unprofessional conduct or with having procured his certificate or license by fraud or perjury, or through error, the district attorney shall bring civil action in the circuit court against the holder and in the name of the state as plaintiff to revoke the license or certificate. The court may appoint counsel to assist the district attorney and either party may demand a jury. No one shall be privileged from testifying fully or producing evidence, but he shall not be prosecuted or subject to penalty on account of anything about which he so does, except for perjury in so doing. If the court or the jury finds for the plaintiff, judgment shall be rendered revoking or suspending the license



or certificate and the clerk of the court shall file a certified copy of the judgment with the examining board or the chiropractic examining board. The costs shall be paid by the county, but if the court determines that the complaint made to the district attorney was wilful and malicious and without probable cause, it shall enter judgment against the person making the complaint for the costs of the action, and payment of the same may be enforced by execution against the body as in tort actions.

(3) When any person licensed or registered by the examining board is convicted of a crime committed in the course of his professional conduct, the clerk of the court shall file with the examining board a certified copy of the information and of the verdict and judgment, and upon such filing the examining board shall revoke or suspend the license or certificate. The examining board shall also revoke or suspend any such license or certificate upon satisfactory proof being made of the conviction of such license or certificate holder in a federal court of a crime committed in the course of his professional conduct. The action of the examining board in revoking or suspending such license or certificate may be reviewed under ch. 227.

**§ 448.18 (7)**

(7) A license or certificate of registration may be temporarily suspended by the examining board, without formal proceedings, and its holder placed on probation for a period not to exceed 3 months where he is known or the examining board has good cause to believe that such holder has violated sub. (1). The examining board shall not have authority to suspend a

license or certificate of registration, or to place a holder on probation, for more than 2 consecutive 3-month periods. All examining board actions under this subsection shall be subject to review under ch. 227.

**§ 448.23 (1)**

**448.23 Fee splitting between physicians and others.**

(1) SEPARATE BILLING REQUIRED. Any physician who renders any medical or surgical service or assistance whatever, or gives any medical, surgical or any similar advice or assistance whatever to any patient, physician, corporation, or to any other institution or organization of any kind, including a hospital, for which a charge is made to such patient receiving such service, advice or assistance, shall render an individual statement or account of his charges therefor directly to such patient, distinct and separate from any statement or account by any physician or other person, who has rendered or who may render any medical, surgical or any similar service whatever, or who has given or may give any medical, surgical or similar advice or assistance to such patient, physician, corporation, or to any other institution or organization of any kind, including a hospital.

**§ 448.23 (2)**

(2) PHYSICIAN PARTNERSHIPS PERMITTED. Notwithstanding any other provision in this section, it is lawful for 2 or more physicians, who have entered into a bona fide partnership for the practice of medicine, to render a single bill for such services in the name of such partnership.



## QUESTION PRESENTED FOR REVIEW

Did the United States District Court for the Eastern District of Wisconsin abuse its discretion when, sitting as a three-judge court, it entered an interlocutory injunction preventing the appellants from engaging in a hearing to suspend the license of the appellee to practice medicine in the State of Wisconsin for six (6) months when the persons who would be the judges at the hearing were the very same persons who personally investigated the charges and had determined that the appellee had violated some laws regulating medicine and that there was probable cause to believe that the appellee had violated the provisions of the laws regulating the medical practice in Wisconsin, thus making the appellants the judges of the charges which they had investigated and brought?

## STATEMENT OF THE CASE

Although this case on paper commenced on July 6, 1973, it has its genesis in the stormy litigation in Wisconsin surrounding the practice of abortion.

In 1970, a three-judge court sitting in the Eastern District of Wisconsin declared the Wisconsin abortion statute unconstitutional. *Babbitz* v. *McCann,* 310 F.Supp. 293 (E. D. Wis. 1970), vac. on other grounds, 402 U.S. 903 (1971). That decision triggered a wave of resistance and a concerted effort by the Attorney General of Wisconsin, the District Attorney in Milwaukee County, the District Attorney in Dane County (Madison) and these appellants to defy the decision of the United States District Court by threatening all members of the medical profession who engaged in the practice of abortion. The officials of the State of Wisconsin were so successful in their effort that only two doctors engaged in administering abortions in a public manner, Dr. Alfred Kennan in Madison, Wisconsin and Dr. Duane Larkin, the appellee here, in Milwaukee, Wisconsin. The litigation surrounding Dr. Kennan was first to follow the *Babbitz* decision.

Initially the District Attorney of Dane County, Mr. Nichol, commenced a criminal action against Dr. Kennan. That action was thwarted by the United States District Court for the Western District of Wisconsin and subsequently by a three-judge court sitting there. *Kennan* v. *Nichol,* 326 F.Supp. 613 (1971) *aff'd.,* 404 U.S. 1055 (1971). However, the authorities of Wisconsin were not persuaded to abate their conduct as a result of the decision in the Madison case. The Attorney General in concert with these appellants, commenced an action against Dr. Kennan which threatened his license to practice medicine. Again, the



federal court in Madison, Wisconsin restrained those activities. See *Kennan* v. *Warren,* 328 F.Supp. 525 (1971). Finally, a circuit court judge in Dane County proceeded on his own to attempt to stop Dr. Kennan and, that judge had to be restrained by Judge Doyle. *Ibid.*

The history of the litigation in Milwaukee with respect to Dr. Larkin is similar. However, most of his cases are not reported. In December of 1971, Judge Myron L. Gordon entered a restraining order preventing enforcement of the Wisconsin abortion statute against Dr. Larkin. *Larkin* v. *McCann, et al,* No. 71-C-671 (E.D. Wis.). While the motion for a preliminary injunction was pending, the Attorney General of Wisconsin commenced an action in Madison, Wisconsin against Dr. Larkin for declaratory relief and obtained abatement of the federal court proceedings pursuant to 28 U.S.C. § 2284(5). The litigation continued there until the entry of Mary Carpenter Bruce. Mrs. Bruce commenced an action in the Circuit Court of Milwaukee, Wisconsin against Dr. Larkin to abate a public nuisance. During the course of those proceedings, which were removed to federal court and then remanded back to the state court,[1] Mrs. Bruce was successful in obtaining a restraining order from a Circuit Court judge. Dr. Larkin commenced an action in the federal court against this Circuit judge and, during the pendency of that action, the Circuit judge withdrew his restraining order. Dr. Larkin also commenced an action in the federal court against Mary Carpenter Bruce and, Judge Myron Gordon held that that case stated a cause of

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[1] *State ex rel. Bruce* v. *Larkin,* 346 F.Supp. 1065 (E.D. Wis. 1972).

action. See *Larkin* v. *Bruce,* 352 F.Supp. 1076 (E.D. Wis. 1972). Thus, in both Madison and Milwaukee, the two abortion clinics were hounded by the Attorney General, the local District Attorney, and a local state Circuit Court judge. At the time of the abortion decisions of the United States Supreme Court, the only group who had not participated in Milwaukee who had participated in Madison was the State Medical Examining Board, the appellants in this case. They went after Dr. Larkin after the abortion decisions of the United States Supreme Court.

On June 20, 1973, the appellant, Thomas W. Tormey, Jr., M.D., acting on behalf of all of the other appellants, executed a Notice of Investigative Hearing which stated that the Board would "determine whether [Dr. Larkin] has engaged in practices that are inimical to the public health, whether he has engaged in conduct unbecoming a person licensed to practice medicine, and whether he has engaged in conduct detrimental to the best interests of the public." The Notice stated further:

> "Based on the evidence adduced at said investigative hearing the Medical Examining Board will determine whether to warn or reprimand if it finds such practice and whether to institute criminal action or action to revoke license if probable cause therefor exists under criminal or revocation statutes."

Service was attempted upon the appellee.[2] Shortly after

[2] Dr. Larkin has never been served with any documents by personal service. Sec. 227.08, Wis. Stats. authorizes agencies to adopt rules for the service of notices and for the conduct of all of its hearings. The Medical Examining Board has never promulgated any rules whatsoever to govern the proceedings involved in this case. Thus, there is no provision within the regulatory agency involved for substituted service of any nature. Paragraph 2(c) of the Second Cause of Action of the Amended Complaint alleges the constitutional depravation due to the fact that the Board does not have any rules.



receiving a copy of the Notice, Dr. Larkin commenced this action in the United States District Court for the Eastern District of Wisconsin. A Motion for a Temporary Restraining Order was denied and this investigative hearing commenced on July 12, 1973. On that same date, Dr. Larkin filed an Amended Complaint. In the Second Cause Action, Dr. Larkin challenged the constitutional validity of the Wisconsin statutory scheme in Paragraphs 2 and 3 as follows:

> "2. The proceedings of the Medical Examining Board as instituted against the plaintiff and as authorized by Chapter 448, Wis. Stats., a copy of which is attached hereto as Exhibit D, are unconstitutional and in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution in that:
>
> (a) The phrases "inimical to the public health", "conduct unbecoming a person licensed to practice medicine" and "conduct detrimental to the best interests of the public" are vague, overly broad and cause men of reasonable intelligence to guess as to their meaning and effect thereby depriving the plaintiff of notice of prohibited practices as well as providing the defendants with authority to investigate and warn, reprimand or institute criminal actions for activities of the plaintiff which are protected by the Constitution of the United States of America.
>
> (b) The Notice of Investigative Hearing, Exhibit B, states that at the conclusion of the hearing the Board will determine whether to warn or reprimand the plaintiff or whether the Board will institute criminal actions or actions to revoke license if they conclude that probable cause exists and, said notice prohibits the plaintiff and his at-

torney from cross examining any of the witnesses against him and from in any way appearing in these hearings in a meaningful fashion thereby subjecting the plaintiff to punishment and official condemnation without being afforded his right to be confronted by the witnesses against him, without being afforded his right to notice of the nature of the charges against him, without being afforded the opportunity to produce witnesses on his behalf, without being afforded the compulsory process for witnesses, and without being afforded a trial by jury or by persons other than his accusers, all in violation of rights guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(c) The Medical Examining Board of the State of Wisconsin has not promulgated any rules with respect to the conduct of these proceedings. Thus, the proceedings will be regulated on an *ad hoc* basis in violation of due process of law because there are no rules to determine what process is due the plaintiff.

(d) The Notice of Investigative Hearing states that a criminal action will be brought against the plaintiff if the Board finds probable cause under the criminal statutes of the State of Wisconsin. This proceeding denies to the plaintiff the right to have a determination of probable cause made by an impartial, neutral, independent and detached judicial officer or by a grand jury, in violation of rights guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

3. These proceedings as embodied in the Notice of Investigative Hearing are brought pursuant to authority which appears in Sec. 448.17 and 448.18, Wis.



Stats. These statutes authorize the Board to warn, reprimand, determine probable cause, *suspend a license,* and *temporarily suspend a license* and, such statutory scheme is in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution as more particularly set forth in the preceding paragraph." (Emphasis supplied).

The Amended Complaint in its request for relief at ¶5 asked for a Temporary Restraining Order and a Preliminary Injunction in the case.

At the time of the filing of the Amended Complaint, the appellants were only investigating the appellee and, on each and every occasion where they had an opportunity to do so, they assured the United States District Court for the Eastern District of Wisconsin that any effort to remove the license of Dr. Larkin, either permanently or temporarily, would only be done in a judicial proceeding and would not be done by these appellants. The counsel for the appellants repeatedly compared the activities of the appellants to a grand jury. See Appellant's briefs filed in District Court.

At Page 1 of the appellants' Reply Brief in support of their Amended Motions to Dismiss, the appellants stated the following:

"The Medical Examining Board is not authorized to indict, but must go to the District Attorney to seek prosecution or action to revoke *or suspend* the license of one of its licensees." (Emphasis supplied).

At Page 3 of that same brief, the appellants made the following statement to the federal court:

"The obvious distinction is that in the present case the Medical Examining Board is conducting an inves-

tigative hearing and not a contested hearing. *Any contested hearing will be held before a court and/or jury.*" (Emphasis supplied).

At Pages 5 and 6 of that same brief, the appellants stated that any revocation proceedings would be "steeped in due process provisions."

In that posture and with those assurances regarding the procedure being employed against Dr. Larkin, the United States District Court for the Eastern District of Wisconsin repeatedly denied requests for preliminary injunctive relief.

The proceedings against Dr. Larkin with respect to the so-called investigative hearing were held on July 12 and 13, 1973, and were continued on October 4, 1973. Between July 13, 1973 and October 4, 1973, and, on September 18, 1973, the appellants, acting pursuant to Sec. 448.18 (7), Wis. Stats., completely changed their posture and issued a Notice of Contested Hearing against Dr. Larkin. The Board scheduled the contested hearing for the afternoon of October 4, 1973. Thus, the contested hearing was directed to take place at the conclusion of the investigative hearing. The issues involved in the contested hearing were identical to the issues which had been investigated by the Board. They were concerned with:

1. Whether Dr. Larkin practiced medicine under a different name than the one which appears on his license;

2. Whether Dr. Larkin allowed an unlicensed physician to practice medicine at his clinic;

   and

3. Whether Dr. Larkin split fees with other persons.[3]

[3] This Notice of Contested Hearing was served in the same improper manner as the original Notice.



On September 20, 1973, the appellee filed a copy of the Notice of Contested Hearing with the United States District Court with an accompanying letter. Counsel for the appellants have received all documents and letters referred to herein. In the accompanying letter, the appellee stated the following:

> "The present posture of the proceedings is a classic example of violations of due process of law. The so-called investigation was conducted by the defendants. Before that investigation is completed, the same defendants bring charges against the plaintiff and are his accusers. The judge and jury of the charges are the same people who preferred them. At the conclusion of the hearing, his accusers and judges will then pass sentence upon him. Thus, the procedure violates most known tenets of due process of law. (Citing cases).
>
> "We now ask the court for an immediate restraining order to prevent irreparable harm which is being threatened against Dr. Larkin in violation of the constitution of the United States."

On September 26, 1973, the appellee filed another Motion for Temporary Restraining Order and Interlocutory Injunction. That Motion focused upon the contested hearing which was scheduled to commence on October 4, 1973 and incorporated as grounds the positions "more fully set forth in the affidavits and briefs previously filed herein." The letter accompanying the Motion to Judge Gordon, a copy of which was sent to counsel for the appellants, stated the following:

> "Enclosed is a Motion for Temporary Restraining Order and Interlocutory Injunction which specifically focuses upon the latest maneuver by the defendants

whereby they are attempting to suspend Dr. Larkin's license pursuant to the provisions of Sec. 448.18 (7), Wis. Stats. The Amended Complaint in the case generally challenged the validity of Sec. 448.18, and Paragraph 2(b) in conjunction with Paragraph 3 of the Second Cause of Action specifically challenged the constitutionality of the Board to invoke Sec. 448.18 (7) to temporarily suspend the license without being afforded a trial by jury or by persons other than his accusers, *inter alia.*"

In a decision dated October 1, 1973, the Honorable Myron L. Gordon ordered the entry of a Temporary Restraining Order. The court detailed the history of the proceedings and noted that the action by the Board in pursuing a contested hearing changed the proceedings "radically." The court summed up the situation which it was facing as follows:

"The plaintiff, a licensed physician who performs abortions in this state, brought this action against the members of the state medical examining board for injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

"The complaint alleged that an investigative hearing had been initiated concerning Dr. Larkin, but that the notice thereof failed to disclose any specific allegations of misconduct. It was further alleged, upon information and belief, that the investigation was launched in order to punish the plaintiff for performing abortions.

"A motion for a temporary restraining order, filed with the complaint, was denied. I concluded that the plaintiff's complaint was insufficient to justify interference with the examining board's attempt to perform



its statutory investigative duty. The plaintiff was given the opportunity, however, to submit memoranda with respect to his motion for a preliminary injunction.

"Following a motion to dismiss filed by the defendants, the plaintiff amended his complaint to challenge the constitutionality of the statutes authorizing the examining board to act. A request to convene a three-judge court and a motion for a temporary restraining order or preliminary injunction were also filed. The defendants amended their motion to dismiss so as to make it applicable to the amended complaint.

"The plaintiff's motion for a temporary restraining order was again denied. Although I believed then, as I do now, that there is a serious question as to the validity of legislation which allows an examining board both to rule on *and* to punish for charges evolving from its own investigation, that question was not presented at that time. The challenge was only to the activity then being engaged in by the board, which was investigation.

"Again, however, the plaintiff was given the opportunity to submit authorities in support of his position, and the defendants were allowed to brief the motion to dismiss. It was anticipated that the arguments presented by the parties would also be helpful toward resolving the question of whether a three-judge court was required.

"Since that time, the status of this action has changed radically. The board is no longer engaged in an investigative proceeding, for it has notified the plaintiff that it has scheduled a 'contested hearing' at which it will determine whether his license should be temporarily suspended. The board's current action makes all allegations of the plaintiff's amended complaint germane. The positions of the parties can no longer be assessed in terms of a limited challenge in-

volving only investigative proceedings; the board's present action calls into play all challenges to the statutory scheme as detailed in the plaintiff's complaint." *Larkin* v. *Withrow,* 368 F.Supp. 793, 794 (E.D. Wis. 1973).

The appellants, in response to this order of Judge Gordon, did not proceed with their contested hearing, but they did continue their investigative hearing on October 4, 1973. They concluded that hearing on that date and, on October 5, 1973, the appellants issued Findings of Fact and Conclusions of Law. Those findings and conclusions resolve every issue presented in the Notice of Contested Hearing against the appellee, Dr. Larkin. See appellee's appendix.

Subsequently, on November 19, 1973 the three-judge court met and announced from the bench that the Motion for a Preliminary Injunction would be granted. In lieu of Findings of Fact and Conclusions of Law, the three-judge court issued a written decision dated December 21, 1973. *Larkin* v. *Withrow,* 368 F.Supp. 796 (E.D. Wis. 1973). In that decision, the three-judge court stated that the loss to a physician of his right to practice medicine constitutes a loss of his liberty or property. Furthermore, such a person is entitled to procedural due process because of the "significant interference with his property rights or his liberty." *Id.* at p. 797. The court stated:

> "In our view, the interference with a physician's ability to practice his profession qualifies as an interference with a property right. It is certainly 'a sufficient threat of personal detriment.' Doe v. Bolton, 410 U.S. 179, 188 (1973)." *Ibid.*

The court went on to state that the suspension of a license to practice medicine "presumptively has a serious adverse affect on the physician's reputation. Thus, it is clear that



the plaintiff's liberty is also at stake." *Ibid.* In that language, the court demonstrated its position that there would be irrevocable injury to the appellee. The court noted that there was no exhaustion available in the state courts in the following language:

> "It is true that any action taken by the board pursuant to Sec. 448.18 (7) is subject to judicial review under Sec. 227, Wis. Stats. (1971). However, that review statute goes only to the propriety of the board's *exercise* of statutory authority. We found that the very statutory authority *empowering* the board to act in the first instance was itself unconstitutional." (Emphasis, the court's). *Id.* at p. 798.

The appellants appeal the entry of this interlocutory judgment to the United States Supreme Court.

## ARGUMENT

### THIS CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

The issue involved in this case is whether a state administrative agency can suspend the license of a doctor after it had held an investigative hearing wherein they heard witnesses and concluded that the doctor had violated provisions of the Wisconsin law. This case presents more than some minor mixing of accusatorial and adjudicatorial functions in an administrative agency. This case presents a factual situation where the board conducted a full and complete investigation and had concluded in an *ex parte* hearing that Dr. Larkin had violated the law and then proposed to be the judge of its own accusation in a so-called contested hearing. There is no support in the settled law of the United States for such bias on the part of administrative boards.

In *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), this Court overturned the dismissal of a school teacher who had made critical remarks against his Board of Education. It was that same Board of Education which tried this teacher. The issue regarding mixing of functions was raised for the first time on appeal. This Court commented on that issue in the following manner:

> "Appellant requests us to reverse the state courts' decisions upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this Court, not having raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case. *On the other hand, we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning vis-a-vis appellant.* Compare Tumey v. Ohio, 273 U.S. 510 (1927); In Re Murchison, 349 U.S. 133 (1955). Accordingly, since the state courts have at no time given de novo consideration to the statements in the letter, we feel free to examine the evidence in this case completely independently and to afford little weight to the factual determinations made by the Board." 391 U.S. at p. 578. (Emphasis supplied).



Indeed, the United States Court of Appeals for the Second Circuit in a case involving the expulsion of a cadet from the Merchant Marines Academy stated the obvious proposition of law as follows:

> "It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that prior official involvement renders impartiality most difficult to maintain." *Wasson* v. *Trowbridge,* 382 F.2d 807, 813 (2nd Cir. 1967).

Suspension or revocation of a right to practice a profession in a state is comparable to a criminal proceeding. See *In Re Ruffalo,* 390 U.S. 544, 550-551 (1968).[4] Thus, the basic protections required in criminal cases must be granted to Dr. Larkin. One of those basic rights is trial by an impartial fact-finder. With respect to revocation of parole

[4] In *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923) and *Board of Regents* v. *Roth,* 408 U.S. 564, 572 (1972), this Court clearly held that a citizen of the United States has a vested right to pursue the common occupations of life and that this right can be protected by a federal civil rights proceeding.

and probation, the Court has held that one of the minimum protections of due process of law is "an independent decision maker." The decision on the merits of the allegations against a parolee or a probationer must be made by someone other than the person who brings the charges. See *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) and *Gagnon* v. *Scarpelli,* 411 U.S. 778, 786 (1973).

This case presents a most aggravated attempt to deprive the appellee of due process of law. At the time when the three-judge court entered its preliminary injunction, the appellants in this case had made formal Findings of Fact and Conclusions of Law which resolved every issue in the case against Dr. Larkin. This was done at the conclusion of an *ex parte* hearing. The Board, in that same decision presented the matter to the District Attorney of Milwaukee County with a finding of probable cause that Dr. Larkin had violated the criminal laws of the State of Wisconsin and that his license should be revoked on the basis of their findings of fact. After this decision was made, these appellants then proposed to conduct a so-called Contested Hearing. In that Contested Hearing, the appellants would re-review the evidence and then decide whether the charges which they had previously preferred against Dr. Larkin supported a six (6) month suspension of his license to practice medicine. Thus, the "grand jurors" would become the "petit jurors." None of the other cases which have struck down the mixing of functions in administrative agencies involved such an aggravated fact situation. See *American Cyanide Company* v. *FTC,* 363 F.2d 757 (6th Cir. 1966); *Amos Treat & Co., Inc.* v. *SEC,* 306 F.2d 260 (D.C. 1962); *Mack* v. *Florida State Board of Dentistry,* 296 F.Supp. 1259 (S.D. Fla. 1969), aff. and vac'd. 430 F.2d 862 (5th Cir. 1970); *cert. den.* 401 U.S. 954 (1971); *Trans*



*World Airlines* v. *CAB,* 254 F.2d 90 (D.C. 1958); *Texaco* v. *FTC,* 336 F.2d 754, 760 (D.C. 1964) and *Glass* v. *Mackie,* 370 Mich. 482, 122 N.W.2d 651 (1963).

The mixing of functions which is present in this case does not even present a close question under the Constitution of the United States. In *In Re Murchison,* 349 U.S. 133 (1955), this Court observed that no state has ever forced a defendant to accept grand jurors as his trial jurors. In unmistakably clear language, this Court stated the fundamental due process right as follows:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatorial process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Id.* at p. 137.

See also *Offutt* v. *United States,* 348 U.S. 11 (1954) and *Bloom* v. *Illinois,* 391 U.S. 194, 202 (1968). This elemental due process admonition which is applicable to judges and juries is equally applicable to administrative agencies which try to revoke and suspend the license of a doctor to practice medicine.

The appellants raise other issues, none of which are substantial.

The appellants claim that the Motion for a Preliminary Injunction did not state the grounds. As pointed out in the Statement of the Case, the Motion contains grounds; there was a Motion for a Preliminary Injunction incorporated with the Amended Complaint; and the letters transmitting the Motion for a Preliminary Injunction clearly set forth the nature of the Motion.

The three-judge court complied with Rule 52(a), FRCP because its memorandum of decision constitutes sufficient Findings of Fact and Conclusions of law.[5]

The appellants complain that there was an administrative remedy available. However, the three-judge court pointed out that there was no effective administrative remedy available because the appeal only determines the propriety of the exercise of the statutory authority of the Board. In this case, the court concluded that the Board itself was improperly constituted. Thus, the appeal is meaningless because the reviewing court would only determine whether there was sufficient evidence to support the findings of the Board, were they allowed to proceed. *Hilboldt* v. *Wis. R. E. Brokers' Bd.*, 28 Wis.2d 474, 482, 137 N.W.2d 482 (1965). The nature of the challenge here is that the Board was biased, and that their findings could not be anything more than a reflection of their bias.[6] This

[5] If the Court concludes that the opinion of the three-judge court is not specific enough, the remedy is merely a remand to comply with Rule 52(a).

[6] Although the merits of the charges against Dr. Larkin are not at issue at this time, the fact of the matter is that Dr. Larkin has legal and factual defenses to the charges. Section 448.02 (4), Wis. Stats. does not prohibit practicing under a false name. That statute prohibits practicing under a false name after the Board makes a finding, after a hearing "that practicing under such changed name operates to unfairly compete with another practitioner or to mislead the



Court stated in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973):

> "In the instant case the matter of exhaustion of administrative remedies need not detain us long. Normally when a state has instituted administrative proceedings against an individual who then seeks an in-

(Footnote continued)

public as to identity or to otherwise result in detriment to the profession or the public." The statutory history shows that the State of Wisconsin originally enacted an absolute prohibition against doctors using assumed names. That absolute prohibition was modified by the language quoted above. See History of Sec. 448.02 in Wis. Stats. Annot.

There is no statute prohibiting soliciting patients by means of agents. Indeed, Sec. 448.18 (1)(b) prohibits advertising with respect to venereal diseases and lost manhood or womanhood. No other prohibition against advertising has been found in Chapter 448. Presumably, other forms of advertising are not prohibited in Wisconsin.

Although Sec. 448.02 (1) prohibits the practice of medicine without a license, that statute contains exceptions. Section 448.16, Wis. Stats. states that medical physicians of other states or countries in consultation with resident licensed practitioners do not have to be licensed by the State of Wisconsin. See 1927 Op. of the A.G. of Wisconsin 702, where the Attorney General held that an Illinois physician was not required to obtain a Wisconsin license to practice medicine in Wisconsin in the office of a doctor who was licensed in Wisconsin. Dr. Young Whan Ahn was licensed to practice medicine in the State of Georgia in the fall of 1972, and, upon information and belief was licensed to practice medicine at all times pertinent in the Republic of South Korea. Also, a license is not required for treatment rendered in an emergency. "Emergency" has not been defined by cases in Wisconsin. It is a matter of public record that the Medical Examining Board, in conjunction with the Attorney General and the District Attorney of Milwaukee County threatened the medical profession with punishment if any engaged in the practice of administering abortions in violation of Sec. 940.04, Wis. Stats. They were so successful in their intimidation that only Dr. Kennan and Larkin regularly performed abortions in their clinics

junction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is contested and administrative expertise, discretion or fact-finding is involved. *But this court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. § 1983.*" *Id.* at p. 574. (Emphasis supplied)

In addition, this is not a criminal case, and Dr. Larkin had commenced this action in the federal courts *prior to* the commencement of the so-called contested hearing whereby the appellants attempted to suspend his license to practice medicine.

The appellants complain that there was insufficient evidence in the record to support the preliminary injunction. This is a specious claim since the operative facts which

(Footnote continued)
under protection of the federal courts. Thus, women in need of medical treatment and entitled under the law of medical treatment were turned away by most doctors because of the public threats of these public officials. These same public officials here sought to investigate Dr. Larkin to pass judgment upon his response to the medical emergency which they illegally created.

The so-called fee splitting section, Sec. 448.23 (1), Wis. Stats. is very limited in scope. The statute compels physicians to render an individual statement for his charges even though the physician is working for some institution or organization. The statute does not prohibit a doctor from paying another person money for any reason whatsoever.

The appellants have disqualified themselves from resolving these factual controversies because they were the investigators of Dr. Larkin and, at the time of the entry of the Preliminary Injunction, they had become his formal accusers due to the entry of their Findings of Fact and Conclusions of Law. See appellee's Appendix.



were relied upon by the District Court are uncontested. They are as follows:

1. The appellants investigated Dr. Larkin in an *ex parte* hearing;
2. At the conclusion of this investigative hearing, the appellants made Findings of Fact and Conclusions of Law which resolved the factual issues in the case;
3. The appellants in those Findings of Fact and Conclusions of Law transmitted to the District Attorney of Milwaukee County, Wisconsin a recommendation and finding of probable cause that criminal and civil forfeiture of license proceedings be commenced against Dr. Larkin;
4. The appellants proposed by a Notice of Contested Hearing to try Dr. Larkin upon charges which were identical to the findings which had previously been made and, at the conclusion of that so-called contested hearing to decide whether to suspend Dr. Larkin's license to practice medicine for a period of up to six months;
6. The statutory scheme of the State of Wisconsin contained in Chapter 448 authorizes such proceedings;
6. None of the charges brought against Dr. Larkin at any time challenged his qualifications as a physician to practice medicine in the State of Wisconsin and none of the allegations against him even remotely suggest that he is incompetent to practice medicine in the State of Wisconsin or that his clinic has in any way injured any citizen of the State of Wisconsin due to lack of proper medical treatment.

All of these operative facts were submitted in the form of affidavits or by the Amended Complaint. These operative facts were not in any way challenged by the appellants. The appellants in their brief do not show whether they disagree with any of the operative facts in the case. In fact, they can have no disagreement with any of the operative facts since they are all documented by official records and statutes of Wisconsin.

The appellants complain that the district court did not make a finding of irreparable injury. While those words were not used in the decision by the trial court, it is clear from their opinion that they found that the denial of the right to practice medicine under these circumstances constituted an irreparable injury, and also imposed a loss of reputation in the community which was irreparable. Such grounds were considered adequate with respect to the optometry profession in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973). Indeed, it is beyond dispute that the right to practice a profession is a valuable right and its suspension or revocation is an irreparable injury. See *In Re Ruffalo*, 390 U.S. 544 (1968); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923); *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). Cf. *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); *Weiman* v. *Updegraff*, 344 U.S. 183 (1952).

Finally, the appellants complain that the court should not have declared the Wisconsin statutory scheme unconstitutional in a preliminary order. While this is technically correct, it is clear that the federal three-judge court concluded that the chances of success by Dr. Larkin were substantial because in their view the statutory scheme as applied in this case was unconstitutional. At best, this is a hypertechnical objection on the part of the appellants and,



if they desired any clarification with respect to the scope of the decision, they were certainly free to request clarification from the district court. They failed to request this clarification, and they thus present themselves in a position where they appear to be more interested in a hypertechnical reversal than in determining the scope of the decision of the United States District Court for the Eastern District of Wisconsin. The opinion of the court did not close the doors of the federal courts to these appellants. They have not demonstrated how they have been in any way harmed by this preliminary injunction.

## CONCLUSION

On the basis of the foregoing it is respectfully requested that the Court dismiss or affirm the Preliminary Injunction in this case.

Respectfully submitted,

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# APPENDIX

APPENDIX

**APPELLEE'S APPENDIX**

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
MEDICAL EXAMINING BOARD

In the Matter of the
Investigation of the Practices of
DUANE R. LARKIN, M.D., Licensee.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

The Medical Examining Board, having conducted an investigative hearing and having heard testimony and evidence concerning the medical and surgical practices of Duane R. Larkin, M.D., on July 12 and 13 and October 4, 1973, in accordance with sec. 448.17, Stats., now makes the following

FINDINGS OF FACT

(1) That Duane R. Larkin, M.D., hereafter called the licensee, is a resident of Livonia, Michigan.

(2) That the licensee was granted license number 17697 by reciprocity with the State of Michigan to practice medicine and surgery in the State of Wisconsin on or about August 17, 1971, and that thereafter he opened an office for the practice of medicine, specializing in the performance of abortions, at 710 North Plankinton Avenue and 710 North Sixth Street, Milwaukee, Wisconsin.

(3) From on or about August 17, 1971, until on or about April 25, 1972, the licensee rented quarters and

subsequently practiced medicine and surgery at 710 North Plankinton Avenue, Milwaukee, Wisconsin, under a name other than that for which he was originally licensed to practice medicine and surgery in the State of Wisconsin, to wit: Glen Johnson, and that such conduct operated to mislead the public as to his identity.

(4) From on or about August 17, 1971, until on or about May 25, 1973, the licensee counseled and advised doctors employed by him at his abortion clinic at both of the above addresses in Milwaukee, Wisconsin, to use names other than the names under which they were originally licensed to practice medicine and surgery in Wisconsin, to wit:

(a) Dr. Ik Hak Bae to use the name Dr. Rhee,

(b) Dr. Krishna Murthy, an unlicensed doctor holding a temporary educational certificate, to use the name Dr. Reamon or Ramon,

(c) Dr. Young Whan Ahn, an unlicensed doctor, to use the name Dr. Park,

and that such conduct operated to mislead the public as to the identity of the doctors involved.

(5) From on or about August 17, 1971, to on or about February 27, 1973, the licensee has split professional fees earned from abortions performed at the above addresses with Robert C. Moore of Detroit, Michigan, operator of Haven Midwest, an abortion referral agency, in payment for the patients solicited by Robert C. Moore and referred to the licensee for abortions; that the licensee had similar arrangements with other referral agencies and other individuals.

(6) That between on or about August 17, 1971, and on or about February 27, 1973, the licensee employed unlicensed persons to engage in the practice of medicine and



surgery, including a Dr. Young Whan Ahn and Dr. Krishna Murthy, an unlicensed doctor holding a temporary educational certificate which limited his practice to medical training at Mount Sinai Hospital, Milwaukee, Wisconsin.

(7) That between on or about August 17, 1971, and on or about September 30, 1973, the licensee has split fees with Dr. Benjamin Victoria, Dr. Ik Hak Bae, Dr. Krishna Murthy, and Dr. Young Whan Ahn and has failed to render individual statements or accounts of his charges to patients for services of himself and other physicians.

## CONCLUSIONS OF LAW

(1) That in practicing medicine and surgery under the name Glen Johnson the licensee was engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public, within the meaning of sec. 448.18 (1) (g), Stats.

(2) That in counseling and advising doctors employed by him at his abortion clinic to use names other than the names under which they were originally licensed to practice medicine and surgery in Wisconsin, the licensee has engaged in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public, within the meaning of sec. 448.18 (1) (g), Stats.

(3) That in splitting fees with referral agencies such as Haven Midwest and with other doctors, there is probable cause to believe that the licensee has violated the provisions of sec. 448.23 (1), Stats., and has engaged in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public within the meaning of sec. 448.18 (1) (g), Stats.

(4) That in permitting unlicensed persons to practice medicine and surgery there is probable cause to believe that the licensee has violated secs. 448.02 (1) and 939.05 (2) (c), Stats., and has engaged in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public within the meaning of sec. 448.18 (1) (g), Stats.

## DECISION

Within the meaning of sec. 448.17, Stats., it is hereby determined that there is probable cause to believe that the licensee has violated the criminal provisions of ch. 448, Stats., and that there is probable cause for an action to revoke the license of the licensee for engaging in unprofessional conduct.

Therefore, it is the decision of this Board that the secretary verify this document and file it as a verified complaint with the District Attorney of Milwaukee County in accordance with sec. 448.18 (2), Stats., for the purpose of initiating an action to revoke the license of Duane R. Larkin, M.D., to practice medicine and surgery in the State of Wisconsin and initiating appropriate actions for violation of the criminal laws relating to the practice of medicine.

BY THE BOARD:
/s/ *Thos. W. Tormey, Jr.*
Thos. W. Tormey, Jr., M.D.,
Secretary

Subscribed and sworn to before me
this 5th day of October, 1973.
*Deanna Zeplowski*
Notary Public,
Dane County, Wisconsin

My commission expires October 24, 1976.

Supreme Court, U. S.
FILED
JUL 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1573

HAROLD WITHROW, D.O.;
THOMAS HENNEY, M.D.;
A. J. SANFELIPPO, M.D.;
JOHN M. IRVIN, M.D.;
J. W. RUPEL, M.D.;
A. L. FREEDMAN, M.D.;
MARK T. O'MEARA, M.D.;
THOMAS W. TORMEY, Jr., M.D.;
individually and as members of the
Medical Examining Board of the
State of Wisconsin,

*Appellants,*

*v.*

DUANE LARKIN, M.D.,

*Appellee.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN**

## BRIEF OF APPELLANTS

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July 25, 1974

## INDEX AND SYNOPSIS OF ARGUMENT

*Page*

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL PROVISION INVOLVED ..... 2

WISCONSIN STATUTES INVOLVED ..... 3

QUESTIONS PRESENTED ..... 6

STATEMENT OF THE CASE ..... 7

SUMMARY OF ARGUMENT ..... 13

ARGUMENT ..... 16

**I. The Judgment Granting A Preliminary Injunction Must Be Reversed Because The District Court Therein Improperly Declared A State Statute Unconstitutional And Improperly Preliminarily Enjoined All Utilization Of That Statute** ..... 16

*A. A district court cannot declare a state statute unconstitutional in deciding and granting a mere motion for a preliminary injunction* ..... 18

*B. A district court cannot preliminarily enjoin all utilization of a state statute* ..... 19

*C. These errors are serious and require the reversal of the judgment* ..... 20

**II. The *Per Se* Possession And Exercise By An Administrative Agency Of Both Statutory Powers To Investigate And To Adjudicate Is Not A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution** ..... 22

*Page*

*A. It has been uniformly held by this and other courts that mere possession and exercise of both an investigative and an adjudicative function by an administrative agency is not a violation of due process* ..... 25

1. This Court has so held ..... 25

2. Other courts have so held ..... 28

*B. This district court's contrary decision is the result of misapplication and misconstruction of certain inapplicable decisions of this Court* ..... 32

*C. Even though the Board had conducted an ex parte investigative hearing into the medical practices of a licensee, it is a "fair tribunal" to adjudicate whether the license of the licensee should be temporarily suspended* ..... 35

1. The Board meets the standards for determining a "fair tribunal" in a criminal prosecution and, therefore, must be a "fair tribunal" to adjudicate at the proposed contested hearing ..... 35

2. These standards, however, should not apply in determining whether a licensing board is a "fair tribunal" to suspend or revoke a license ..... 38



*Page*

*D. If the decision of the district court is correct, all grants of adjudicative power to an administrative agency possessing and exercising investigative powers are unconstitutional* ..... 41

**III. Under The Circumstances Of This Case, The District Court Had No Discretion To Issue A Preliminary Injunction, But If So, It Abused its Discretion In So Doing** ..... 43

*A. The district court herein possessed no discretion to issue a preliminary injunction* ..... 44

1. This Court has established the principles governing the availability of preliminary injunctive relief and the grounds for the granting of a motion therefor ..... 44

2. The moving party has the burden of showing, by evidence, the availability of injunctive relief in his case and of establishing grounds for the granting of his motion ..... 46

3. Since the moving party herein completely failed to establish, by evidence, both the availability of such relief and grounds for the granting of his motion, the district court had no discretion to grant the motion ..... 47

*Page*

*B. If any discretion to grant the motion was possessed by the district court, it abused its discretion* ..... 49

CONCLUSION ..... 50

CASES CITED

Alabama Public Service Com'n v. Southern Ry. Co. (1951), 341 U.S. 363, 71 S.Ct. 775, 95 L.Ed. 1016 ..... 44

Amos Treat & Co. v. Securities and Exchange Commission (D.C. Cir. 1962), 306 F. 2d 260 ..... 29

Barsky v. Board of Regents of N.Y. (1954), 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829 ..... 21,22,39

Beacon Theatres, Inc. v. Westover (1959), 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988 ..... 44,45

Belizaro v. Zimmerman (3rd Cir. 1952), 200 F. 2d 282 ..... 29

Belsinger v. District of Columbia (D. D.C. 1969), 295 F. Supp. 159 ..... 29

Board of Medical Examiners v. Steward (1954), 203 Md. 574, 102 A. 2d 248 ..... 40

Brinkley v. Hassig (10th Cir. 1936), 83 F. 2d 351 ..... 29, 40

Cameron v. Johnson (1968), 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed. 2d 182 ..... 45

Duffield v. Memorial Hospital Ass'n of Charleston (S.D. W.Va. 1973), 361 F. Supp. 398 ..... 40



*Page*

Duke v. North Texas State University (5th Cir. 1973), 469 F. 2d 829, cert. den. 93 S.Ct. 2760 ..... 29, 35

Ex Parte Fahey (1947), 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041 ..... 44

Federal Home Loan Bank Bd. v. Long Beach Fed. S. & L. Ass'n (9th Cir. 1961), 295 F. 2d 403 ..... 40

Federal Trade Comm. v. Cement Institute (1948), 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010, reh. den. 334 U.S. 839, 68 S.Ct. 1492, 92 L.Ed. 1764 ..... 13, 14, 25, 26, 38, 40

Federal Trade Comm. v. Cinderella Career and Finishing Schools, Inc. (D.C. Cir. 1968), 404 F. 2d 1308 ..... 29

Gagnon v. Scarpelli (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 ..... 13,14,32,33,34,35

Geiger v. Jenkins (N.D. Ga. 1970), 316 F. Supp. 370 ..... 21

Geiger v. Jenkins (1971), 401 U.S. 985, 91 S.Ct. 1236, 28 L.Ed. 2d 525 ..... 21

Gibbs v. Buck (1939), 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111 ..... 45

Gibson v. Berryhill (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488 ..... 28, 38, 44, 45

Goldberg v. Kelly (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 ..... 32,33,34,35

*Page*

Hatahley v. United States (1956),
351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 ..... 49

Hecht Company v. Bowles (1944),
321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 ..... 46

Henneford v. Northern Pac. Ry. Co. (1938),
303 U.S. 17, 58 S.Ct. 415, 82 L.Ed. 619 ..... 44

Holt v. Raleigh City Board of Education (4th Cir. 1959),
265 F. 2d 95, cert. den. 361 U.S. 818 ..... 29

Illinois Commerce Commission v. Thomson (1943),
318 U.S. 675, 63 S.Ct. 834, 87 L.Ed. 1075 ..... 46

Intercontinental Indus. Inc. v. American Stock Exchange
(5th Cir. 1971), 452 F. 2d 935 ..... 29

Kachian v. Optometry Examining Board (1969),
44 Wis. 2d 1, 170 N.W. 2d 743 ..... 23,31

Kelley v. Everglades Drainage District (1943),
319 U.S. 415, 63 S.Ct. 1141, 87 L.Ed. 1485 ..... 49

Kennedy v. Mendoza-Martinez (1963),
372 U.S. 144, 83 S.Ct. 554, 9 L.Ed. 2d 644 ..... 21

LeBow v. Optometry Examining Board (1971),
52 Wis. 2d 569, 191 N.W. 2d 47 ..... 23,31

Lehigh Portland Cement Company v. F.T.C.
(E.D. Va. 1968), 291 F. Supp. 628 ..... 29

Mack v. Florida State Board of Dentistry
(5th Cir. 1970), 430 F. 2d 862 ..... 29

Marcello v. Bonds (1955),
349 U.S. 302, 75 S.Ct. 757,
99 L.Ed. 1107 ..... 13,27,42



*Page*

Marquette Cement Mfg. Co. v. Federal
Trade Commission (7th Cir. 1945),
147 F. 2d 589 ..... 40

Massachusetts State Grange v. Benton (1926),
272 U.S. 525, 42 S.Ct. 189, 71 L.Ed. 387 ..... 45

Mayo v. Lakeland Highlands Canning Co. (1940),
309 U.S. 310, 60 S.Ct. 517,
84 L.Ed. 774 ..... 13,18,20,22,43,45,49

Moody v. Flowers (1967),
387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed. 2d 643 ..... 20

Morrissey v. Brewer (1972),
408 U.S. 471, 92 S.Ct. 2593,
33 L.Ed. 2d 484 ..... 13,14,32,33,34,35

Murchison, In Re (1955),
349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 ..... 14,36

New York v. O'Neill (1959),
359 U.S. 1, 79 S.Ct. 564, 3 L.Ed. 2d 585 ..... 20

O'Gorman & Young v. Hartford F. Ins. Co. (1931),
282 U.S. 251, 51 S.Ct. 130,
75 L.Ed. 324, 72 A.L.R. 1163 ..... 20

Ohio Oil Co. v. Conway (1929),
279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972 ..... 45

Pangburn v. C.A.B. (1st Cir. 1962),
311 F. 2d 349 ..... 29, 30, 31

Pennsylvania v. Williams (1935),
294 U.S. 176, 55 S.Ct. 380, 79 L.Ed. 841 ..... 46

*Page*

Phillips v. United States (1941),
312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 ..... 20

Pickering v. Board of Education (1968),
391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 ..... 27

Railroad Commission of California v. Pacific Gas
and Electric Co. (1938), 302 U.S. 388,
58 S.Ct. 334, 82 L.Ed. 319 ..... 46

Richardson v. Perales (1971),
402 U.S. 389, 91 S.Ct. 1420,
28 L.Ed. 2d 842 ..... 13, 27, 35, 41

Rose v. State Board of Registration for Healing Arts
(Mo. 1965), 379 S.W. 2d 570 ..... 40

Sampson v. Murray (1974),
— U.S. —, 94 S.Ct. 937,
39 L.Ed. 2d 166 ..... 44,45,46,48,49

Schmidt v. Lessard (1974),
— U.S. —, 94 S.Ct. 713, 38 L.Ed. 2d 661 ..... 18

Securities and Exchange Commission v. R. A.
Holman & Co. (D.C. Cir. 1963), 323 F. 2d 284,
cert. den. 375 U.S. 943 ..... 29

Seidenberg v. New Mexico Bd. of Medical Examiners
(1969), 80 N.Mex. 135, 452 P. 2d 469 ..... 40

Simard v. Board of Education of Town of Groton
(2d Cir. 1973), 473 F. 2d 988 ..... 29

State Corp. Commission v. Wichita Gas Co. (1934),
290 U.S. 561, 54 S.Ct. 321, 78 L.Ed. 500 ..... 45



*Page*

State of Montana ex rel. Yuhas v. Board of
Medical Examiners (1959), 135 Mon. 381,
339 P. 2d 981 ..... 40

State v. Knoblock (1969),
44 Wis. 2d 130, 170 N.W. 2d 781 ..... 37

Terrace v. Thompson (1923),
263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255 ..... 44,45

Toomer v. Witsell (1948),
334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 ..... 44,45

Trans World Airlines v. Civil Aeronautics Board
(D.C. Cir. 1958), 254 F. 2d 90 ..... 29

Tumey v. Ohio (1927),
273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749,
50 A.L.R. 1243 ..... 14, 36

United States ex rel. Dolenz v. Shaughnessy
(2d Cir. 1952), 200 F. 2d 288 ..... 29

United States v. Morgan (1941),
313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 ..... 40

Villani v. New York Stock Exchange
(S.D. N.Y. 1972), 348 F. Supp. 1185 ..... 29

Virginian Ry. Co. v. System Federation (1937),
300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 ..... 46

Voigt v. State (1973),
61 Wis. 2d 17, 211 N.W. 2d 445 ..... 37

Ward v. Village of Monroeville, Ohio
(1972), 409 U.S. 57, 93 S.Ct. 80,
34 L.Ed. 2d 267 ..... 14,37

*Page*

Wasson v. Trowbridge (2d Cir. 1967),
382 F. 2d 807 ..... 29

Watson v. Buck (1941),
313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 ..... 45

Waupoose v. State (1970),
46 Wis. 2d 257, 174 N.W. 2d 503 ..... 37

Wisconsin Telephone Co. v. Public Service Comm.
(1939), 232 Wis. 274, 287 N.W. 122, 287 N.W.
593, cert. den. 309 U.S. 657 ..... 40

Yakus v. United States (1944),
321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 ..... 46

Younger v. Harris (1971),
401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 ..... 44,45

UNITED STATES CONSTITUTION

Article XIV, Section 1, Amendments to
the United States Constitution ..... 2

UNITED STATES STATUTES AND RULES

5 U.S.C. §554 (d) ..... 30, 42

5 U.S.C. §554 (d) (2) ..... 42

28 U.S.C. §1253 ..... 2

28 U.S.C. §1343 ..... 2

28 U.S.C. §2201 ..... 2

28 U.S.C. §2281 ..... 2,20

42 U.S.C. §1983 ..... 2



*Page*

Federal Rules of Civil Procedure:

Rule 7 (b) ..... 15, 16, 49

Rule 52 (a) ..... 12,15,48,49

Rule 65 (a) (2) ..... 17

Rule 65 (c) ..... 49

Rule 65 (d) ..... 18,49

WISCONSIN STATUTES

Chapter 227 ..... 4,23,34

Section 227.09 ..... 23

227.10 ..... 23

227.11 ..... 23

227.13 ..... 23

227.14 ..... 23

227.15 ..... 23

227.17 ..... 4,23,40

227.20 ..... 4,23,40

Chapter 448 ..... 3

Section 448.17 ..... 3, 7, 8, 9, 11, 16, 19, 22, 25, 31

448.18 ..... 3,9,11

448.18 (1) ..... 3,7,23

448.18 (2) ..... 7

448.18 (3) ..... 7

448.18 (7) ..... 2,4,7,9,11,12,16,17,19,22,23,31,34,39,40

*Page*

OTHER AUTHORITIES

97 A.L.R. 2d 1210 ..... 31

1 Am. Jur. 2d, Administrative Law, §77 ..... 31

§78 ..... 31

43 C.J.S., Injunctions, §15 ..... 43

2 Davis, Administrative Law Treatise, §12.04 ..... 40

§13.02 ..... 31

7 Moore's Federal Practice, §65.04 [3] ..... 47

§65.18 [3] ..... 43

11 Wright and Miller,
Federal Practice and Procedure, §2947 ..... 19

§2948 ..... 44

§2949 ..... 47

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1573

HAROLD WITHROW, D.O.;
THOMAS HENNEY, M.D.;
A. J. SANFELIPPO, M.D.;
JOHN M. IRVIN, M.D.;
J. W. RUPEL, M.D.;
A. L. FREEDMAN, M.D.;
MARK T. O'MEARA, M.D.;
THOMAS W. TORMEY, Jr., M.D.;
individually and as members of the
Medical Examining Board of the
State of Wisconsin,
*Appellants,*

*v.*

DUANE LARKIN, M.D.,
*Appellee.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN**

## BRIEF OF APPELLANTS

### OPINIONS BELOW

The opinion of the three-judge United States District Court for the Eastern District of Wisconsin, dated December 21, 1973 (Jurisdictional Statement App. 2-4), is reported at 368 F. Supp. 796. The opinion of the Honorable Myron L. Gordon, district judge, dated October 1, 1973 (App. 47-53), is reported at 368 F. Supp. 793.

## JURISDICTION

This is an action for declaratory and injunctive relief brought under the Civil Rights Act, 42 U.S.C. §1983. Jurisdiction of the district court was invoked under 28 U.S.C. §§1343, 2201, and 2281. A three-judge district court was convened and the judgment of that court, which declared sec. 448.18 (7), Wis. Stats., unconstitutional and preliminarily enjoined its utilization, was dated and entered on January 31, 1974 (Jurisdictional Statement App. 4-5). Notice of appeal therefrom was filed on March 1, 1974 (Jurisdictional Statement App. 6-7). The appeal was docketed in this Court on April 22, 1974, and probable jurisdiction was noted on June 10, 1974. Jurisdiction of this Court rests on and is conferred by 28 U.S.C. §1253.

## CONSTITUTIONAL PROVISION INVOLVED

Article XIV, Section 1, Amendments to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



## WISCONSIN STATUTES INVOLVED

### Chapter 448 — Medical Examining Board

448.17 Investigation; hearing. The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under s. 448.06, that are inimical to the public health. The examining board shall have the power to warn and to reprimand, when it finds such practice, and to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute, and the attorney general may aid the district attorney in the prosecution thereof.

448.18 Revocation. (1) "Immoral or unprofessional conduct" as used in this section mean: (a) Procuring, aiding or abetting a criminal abortion; (b) advertising in any manner either in his own name or under the name of another person or concern, actual or pretended, in any newspaper, pamphlet, circular, or other written or printed paper or document the curing of venereal diseases, the restoration of "lost manhood", the treatment and curing of private diseases peculiar to men or women, or the advertising or holding himself out to the public in any manner as a specialist in diseases of the sexual organs, or diseases caused by sexual weakness, self-abuse or excessive indulgences, or in any diseases of a like nature or produced by a like cause, or the advertising of any medicine or any means whatever whereby the monthly periods of women can be regulated or the menses reestablished, if suppressed, or being employed by or in the service of any person, or concern, actual or pretended so advertising; (c) the obtaining of any fee; or offering to accept a fee on the assurance or promise that a manifestly incurable disease can be or will be permanently cured; (d) wilfully betraying a professional secret; (e) indulging in the drug habit; (f) conviction of an offense involving

moral turpitude; (g) engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public.

* * *

(7) A license or certificate of registration may be temporarily suspended by the examining board, without formal proceedings, and its holder placed on probation for a period not to exceed 3 months where he is known or the examining board has good cause to believe that such holder has violated sub. (1). The examining board shall not have authority to suspend a license or certificate of registration, or to place a holder on probation, for more than 2 consecutive 3-month periods. All examining board actions under this subsection shall be subject to review under ch. 227.

Chapter 227 — Administrative Procedure and Review

227.17 Stay of proceedings. The institution of the proceeding for review shall not stay enforcement of the agency decision; but the reviewing court may order a stay upon such terms as it deems proper, except as otherwise provided in ss. 196.43 and 551.62.

227.20 Scope of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court. The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:

(a) Contrary to constitutional rights or privileges; or

(b) In excess of the statutory authority or jurisdiction of the agency, or affected by other error of law; or



(c) Made or promulgated upon unlawful procedure; or

(d) Unsupported by substantial evidence in view of the entire record as submitted; or

(e) Arbitrary or capricious.

(2) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to him shall not be foreclosed or impaired by the fact that he has applied for or holds a license, permit or privilege under such act.

## QUESTIONS PRESENTED

I. Can a district court in granting a mere motion for a preliminary injunction declare a state statute unconstitutional and preliminarily enjoin all utilization of the state statute?

II. Is the *per se* possession and exercise by an administrative agency of both statutory powers to investigate and to adjudicate a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

III. Under the circumstances of this case, did the district court have any discretion to grant a motion for a preliminary injunction and, if so, did such action constitute an abuse of discretion?



## STATEMENT OF THE CASE

The appellee, hereinafter referred to as Dr. Larkin, is a resident of the State of Michigan (App. 8, 18, 56). He, on the basis of the medical licensing reciprocity agreement between the States of Michigan and Wisconsin, applied for and in August, 1971, was granted a license to practice medicine and surgery in the State of Wisconsin by the Wisconsin Medical Examining Board (App. 57), of which the appellants are members (App. 8-9, 18-19). The appellants are hereinafter referred to as members of the Board.

The Medical Examining Board is the state administrative agency which issues licenses to practice medicine and surgery in Wisconsin. It also, under the provisions of sec. 448.17, Wis. Stats., has a duty to investigate practices inimical to public health and can warn or reprimand a licensee if it finds that the licensee is engaged in such practices. If its investigation discloses probable cause for doing so, it may also complain to a district attorney and seek the institution of an appropriate criminal prosecution or of a civil action to revoke the license of the licensee.

The Board has no power to revoke or suspend a license, except under the here inapplicable provisions of sec. 448.18 (3), Wis. Stats., and under the here applicable provisions of sec. 448.18 (7), Wis. Stats. The latter authorizes the Board to temporarily suspend a license for not to exceed three months if it has good cause to believe that a licensee is engaged in immoral or unprofessional conduct as defined in sec. 448.18 (1), Wis. Stats. Revocation and other than temporary suspension of a medical license can be accomplished only after a successful court action brought by a district attorney. Sec. 448.18 (2) and (3), Wis. Stats.

Dr. Larkin, after receiving his Wisconsin license in August, 1971, immediately rented offices in Milwaukee, Wisconsin (App. 8, 18, 57), and, as subsequently learned, did so under the alias Glen Johnson (App. 57, 58). He performed abortions (App. 9, 15, 19, 57) and commuted between Detroit and Milwaukee. He initially spent Fridays, Saturdays, and Sundays doing abortions in Milwaukee (App. 63-64). After February, 1973, however, he came to Milwaukee on only very infrequent occasions and practically all abortions were performed by an associate, who received a percentage of the gross fee per abortion (App. 64).

On June 20, 1973, the Board issued and mailed to Dr. Larkin a Notice of Investigative Hearing to be held at a designated time and place on July 12, 1973 (App. 13-14). The subject of the investigation was stated therein and Dr. Larkin, either with or without counsel, was invited to attend the ex parte investigative hearing, which was to be held under the authority granted to the Board by sec. 448.17, Wis. Stats. (App. 14). Dr. Larkin was not subpoenaed to testify at such investigative hearing.

Dr. Larkin, on July 6, 1973, filed a civil rights action against the members of the Board in the United States District Court for the Eastern District of Wisconsin. In such action he sought a permanent injunction, a preliminary injunction, and a temporary restraining order enjoining the members of the Board from investigating or holding any investigative hearing on his medical practices (App. 11, 16). The motion for a temporary restraining order was denied and the court established a briefing schedule on the motion for a preliminary injunction (App. 33).



On July 12, 1973, the members of the Board filed a motion to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted (App. 31). Larkin, on the same day, filed an unverified amended complaint (App. 18-25), a new motion for a temporary restraining order and preliminary injunction (App. 25-29), and a motion to convene a three-judge court (App. 25). The amended complaint added a request for declaratory judgment and, in addition to injunctive relief against the investigative hearing, sought a declaration that the procedures for the conduct of the investigative hearing, as authorized by sec. 448.17 and sec. 448.18, Wis. Stats., were unconstitutional (App. 23).

The investigative hearing was held by the Board on July 12 and 13, 1973 (App. 56). Numerous witnesses testified under oath, and the attorney for Dr. Larkin was present throughout the proceedings. The hearing was then adjourned to a future date. Dr. Larkin was subsequently informed in writing, through his attorney, that if he wished, he could appear before the Board and explain any of the evidence which had been presented to it during its investigation (App. 37).

On July 18, 1973, the district court denied a renewed motion for a temporary restraining order (App. 33-35) and thereafter the members of the Board filed a motion to dismiss the amended complaint (App. 37-38).

Although sec. 448.18 (7), Wis. Stats., permits the Board, without formal proceedings, to temporarily suspend a license, the Board, on September 18, 1973, mailed the following Notice of Contested Hearing to Dr. Larkin:

"TAKE NOTICE that a contested hearing will be held on the Board's own motion on October 4, 1973 * * * to determine whether the licensee has practiced medicine in the State of Wisconsin under any other Christian or given name or any other surname than that under which he was originally licensed or registered to practice medicine in this state, which practicing has operated to unfairly compete with another practitioner, to mislead the public as to identity, or to otherwise result in detriment to the profession or the public, and more particularly, whether the said Duane Larkin, M.D., has practiced medicine in this state since September 1, 1971, under the name of Glen Johnson.

"TAKE FURTHER NOTICE that the Board will also hear evidence to determine whether the licensee has permitted persons to practice medicine in this state in violation of sec. 448.02 (1), Stats., more particularly whether the said Duane Larkin, M.D., permitted Young Wahn Ahn, M.D., an unlicensed physician, to perform abortions at his abortion clinic during the year 1972.

"TAKE FURTHER NOTICE that the Board will also hear evidence to determine whether the said Duane Larkin, M.D., split fees with other persons during the years 1971, 1972, and 1973 in violation of sec. 448.23 (1), Stats.

"Based on the evidence adduced at said contested hearing, the Medical Examining Board will determine whether to suspend the license of the said Duane Larkin, M.D., under the authority of sec. 448.18 (7), Stats." (App. 45, 46).

On September 20, 1973, Dr. Larkin's attorney filed an affidavit to which he attached a copy of this notice (App. 44). Thereafter, on September 27, 1973, he filed another Motion for a Temporary Restraining Order and Interlocutory Injunction. This time he sought to restrain and enjoin the



conduct of the contested hearing and the use of sec. 448.18 (7), Wis. Stats., against him (App. 46, 47).

On October 1, 1973, and in the absence of any hearing thereon, the district court issued a decision and order in which it granted Larkin's motion to convene a three-judge court and granted a motion for a temporary restraining order enjoining the members of the Board from proceeding with the contested hearing under sec. 448.18 (7), Wis. Stats., and from enforcing the provisions of that section of the statutes against Dr. Larkin (App. 47-53). It also denied the motion of the members of the Board to dismiss the amended complaint (App. 52).

The Board, on October 4, 1973, heard some additional witnesses and concluded its investigative hearing (App. 56-59). Dr. Larkin did not appear, although his attorney did address the Board. Thereafter the Board issued its investigative findings of fact, conclusions of law, and decision (App. 56-60).

A three-judge court was appointed. The members of the Board filed an answer to the amended complaint, in which they denied all material allegations other than those identifying the parties and alleging that a notice of investigative hearing had been issued by the Board (App. 60-62). There was no consolidation of trial on the merits with the hearing on the motion for a preliminary injunction.

The three-judge court held no evidentiary hearing on the motion for a preliminary injunction or on Dr. Larkin's allegation that sec. 448.17 and sec. 448.18, Wis. Stats., were unconstitutional. Absolutely no evidence in any form was presented in support of the claim of Dr. Larkin that these two sections of the Wisconsin statutes were unconstitutional. The only support for the motion for preliminary

injunction were affidavits of Larkin's counsel, which affidavits merely placed in the record certain newspaper articles (App. 29, 41, 43), a copy of a letter from the attorney for the Board to Larkin's attorney (App. 36-37), a copy of the Board's notice of contested hearing (App. 45-46), the attorney's version of the evidence presented at the investigative hearing (App. 55, 56), and a copy of the Board's findings of fact, conclusions of law, and decision made upon completion of its investigative hearing (App. 56-60).

The three-judge court heard arguments on the motion for a preliminary injunction on November 19, 1973. On that same date it orally declared that sec. 448.18 (7), Wis. Stats., was unconstitutional on the ground, as subsequently explained in its written decision, that:

> "* * * for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as §448.18 (7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decisionmaker, we concluded that it was unconstitutional and unenforceable." (Jurisdictional Statement App. 2, 3.)

It, further, and in the complete absence of any evidence from or even allegations by Dr. Larkin that he had no adequate remedy at law, that he had exhausted his administrative remedies, that there was a reasonable probability of success on the merits, that he would suffer irreparable and certain harm if the relief was not granted, and that granting such relief would not cause undue harm to the public interest, granted the motion for a preliminary injunction enjoining the members of the Board from utilizing sec. 448.18 (7), Wis. Stats. It made and filed no findings of fact and conclusions of law as required by Rule 52 (a), FRCP.



On December 21, 1973, the decision of the three-judge court was filed (Jurisdictional Statement App. 2-4). Thereafter, on January 31, 1974, the court did enter a judgment (Jurisdictional Statement App. 4-5). The members of the Medical Examining Board have appealed to this Court from that judgment (Jurisdictional Statement App. 6-7).

## SUMMARY OF ARGUMENT

I. A three-judge district court in granting a mere motion for a preliminary injunction cannot declare a state statute unconstitutional and commits reversible error in so doing. *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310. It, further, cannot preliminarily enjoin *all* utilization of the state statute, since the sole purposes of a preliminary injunction are to protect the *movant* therefor from suffering irreparable injury during the pendency of the action and to preserve the court's power to render a meaningful decision after trial on the merits.

II. This Court, as well as others, has uniformly held that the *per se* possession and exercise by an administrative agency of both statutory powers to investigate and to adjudicate is not a violation of due process. *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683; *Marcello v. Bonds* (1955), 349 U.S. 302; and *Richardson v. Perales* (1971), 402 U.S. 389. The district court in concluding otherwise misconstrued and misapplied *Gagnon v. Scarpelli* (1973), 411 U.S. 778, and *Morrissey v. Brewer* (1972), 408 U.S. 471.

Since the enjoined hearing and proposed adjudication was an *initial* adjudication on whether the license of a licensee should be temporarily suspended, the question is not, as

perceived by the district court, whether the members of the Board were an "independent decisionmaker," as mandated by *Gagnon* and *Morrissey*, to review a prior decision or recommendation of the same agency, but is whether they are a "fair tribunal" to make an *initial* decision. In criminal and quasi-criminal prosecutions a judge is a "fair tribunal" if he is free of actual bias, has no direct, personal, substantial pecuniary interest in the outcome and no other interest strong enough to tempt him to be other than fair and impartial in making an adjudication. *Tumey v. Ohio* (1927), 273 U.S. 510, *In Re Murchison* (1955), 349 U.S. 133, and *Ward v. Village of Monroeville, Ohio* (1972), 409 U.S. 57. No court has ever held that a judge is not a "fair tribunal" merely because he, during the course of performing his official duties, had previously been exposed to information about a defendant. *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683. The members of the Board herein must be a "fair tribunal" since they do meet the standards or tests as set by this Court for determining when a judge in a criminal prosecution is a "fair tribunal." *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683. For various reasons, here suggested but irrelevant since this Board does meet such standards, an administrative board should not be required to meet all of the standards or tests of a "fair tribunal" as applied to a judge in a criminal prosecution.

If the decision of the district court, that the *per se* possession and exercise by an administrative agency of both powers to investigate and to adjudicate is a violation of due process, is correct, it will destroy, as presently structured, all major administrative agencies, including those whose adjudications fall within the coverage of the Federal Administrative Procedure Act. They all possess and exercise both powers, and if the decision is correct, mere internal separation of functions within the agency is insufficient to comply with the requirements of due process.



III. The district court had no discretion to issue a preliminary injunction in this case, not only because the motion therefor was inadequate under Rule 7 (b), FRCP, and was outside the scope of the subject matter of the action, but also because there was a total and complete absence of ANY evidence presented to the court establishing that such relief was available in this case and a total and complete absence of ANY evidence presented to the court establishing grounds for the granting of the motion. The moving party, who has the burden of so showing, presented no evidence to the court establishing ANY of the following: that he had no adequate remedy at law; that he had exhausted his administrative remedies; that he would suffer "irreparable injury" if the requested relief was not granted; that the federal question presented was "grave" and "substantial" and, therefore, he had a substantial likelihood of success on the merits or that the requested relief would not cause undue harm to the public interest. Because of this, the district court could not and did not make the findings of fact and conclusions of law required by Rule 52 (a), FRCP.

If the district court possessed any discretion to grant the motion, it abused that discretion by the above-described action, but also by its noncompliance with various applicable requirements of the Federal Rules of Civil Procedure and by its granting of preliminary injunctive relief which is so overly broad that it even exceeded the relief requested by the moving party.

## ARGUMENT

### I. The Judgment Granting A Preliminary Injunction Must Be Reversed Because The District Court Therein Improperly Declared A State Statute Unconstitutional And Improperly Preliminarily Enjoined All Utilization Of That Statute.

After unsuccessful attempts to halt the members of the Board from conducting an ex parte investigative hearing into his medical practices, as authorized by sec. 448.17, Wis. Stats., Dr. Larkin, on September 27, 1973, filed another Motion for Temporary Restraining Order and Interlocutory Injunction. This time he sought the restraining and enjoining of the members of the Board from conducting a contested hearing, under the provisions of sec. 448.18 (7), Wis. Stats., to determine whether his license to practice medicine should be temporarily suspended and from "in any way enforcing the provisions of Sec. 448.18 (7), Wis. Stats., against the plaintiff" (App. 46). This motion was inadequate under Rule 7 (b), FRCP,[1] and it was also beyond the scope of the subject matter of the action.[2]

---

1. Rule 7 (b), FRCP, requires that a motion "shall state with particularity the grounds therefor." "Irrevocable harm" is NOT a ground for granting a motion for a temporary restraining order or a preliminary injunction. Absolutely no ground for granting such relief was stated in this motion, in any of the previous motions, or in any of the affidavits previously filed.

2. As revealed by the content of the unverified amended complaint (App. 18, 24), the subject matter of the action was solely the constitutionality of the conduct by the members of the Board of the *ex parte investigative hearing*. The ultimate relief sought was only a declaratory judgment and a permanent injunction against that *investigative* hearing (App. 23, 24).



Despite this and despite the absence of any evidence in support of the granting of the motion, the single-judge district court, without a hearing, did, on October 1, 1973, grant Larkin's September 27 motion for a temporary restraining order. It also granted his previous motion to convene a three-judge court (App. 52) and denied the motion of the members of the Board to dismiss the action (App. 52).

A hearing on the motion for a preliminary injunction was held before the three-judge court on November 19, 1973. There had been and was at the hearing no consolidation of the hearing on the motion with trial on the merits as can be done under the provisions of Rule 65 (a) (2), FRCP. At the hearing Dr. Larkin presented absolutely no testimony or other evidence either in support of his motion or in support of any attack on the constitutionality of sec. 448.18 (7), Wis. Stats. The hearing consisted exclusively of oral argument on the groundless motion for a preliminary injunction.

The three-judge court not only immediately granted the groundless and completely unsupported motion, but it actually declared that sec. 448.18 (7), Wis. Stats., "is unconstitutional" (Jurisdictional Statement App. 4), a declaration which was not even sought by Dr. Larkin in the only motion before the court (App. 46, 47). The judgment of the three-judge court granting the preliminary injunction reads:

> "It is Ordered and Adjudged that §448.18 (7), Wis. Stats., is unconstitutional and that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats." (Jurisdictional Statement App. 5.)

This one-sentence judgment not only does not comply with the requirements of Rule 65 (d), FRCP,[3] but it contains two fatal errors.

### *A. A district court cannot declare a state statute unconstitutional in deciding and granting a mere motion for a preliminary injunction.*

A three-judge district court, in granting a mere motion for a preliminary injunction, cannot declare a state statute to be unconstitutional. This Court unanimously so held in *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774, and reversed the judgment therein. In *Mayo*, after pointing out that a three-judge court had declared a state statute unconstitutional in granting a mere motion for preliminary or temporary injunction, this Court wrote (309 U.S. at 316):

> "We think the court committed *serious error* in thus dealing with the case upon motion for temporary injunction. *The question before it was not whether the act was constitutional or unconstitutional;* was not whether the Commission had complied with the requirements of the act, if valid, *but was whether the showing made raised serious questions, under the Federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants.*" (Emphasis added.)

In his brief to this Court in support of his Motion to Dismiss or Affirm, p. 28, Dr. Larkin admits that the district

3. See *Schmidt v. Lessard* (1974), — U.S. — , 94 S.Ct. 713, 38 L.Ed. 2d 661, in which another inadequate judgment of this same district court was vacated for lack of compliance with Rule 65 (d), FRCP.



court improperly declared the state statute unconstitutional. This point, therefore, will not be argued further.

### *B. A district court cannot preliminarily enjoin all utilization of a state statute.*

The judgment, quoted *supra*, also preliminarily enjoins the members of the Board from utilizing the provisions of sec. 448.18 (7), Wis. Stats., to temporarily suspend the license of any licensee, not just Dr. Larkin, and they are so enjoined whether or not they have previously conducted an investigative hearing under the provisions of sec. 448.17, Wis. Stats. This overly broad and again unsought (App. 46, 47) injunctive relief is completely beyond the scope of a preliminary injunction and is beyond the power of the district court in granting such an injunction.

A preliminary injunction is a device for maintaining the status quo between the parties to an action pending a decision of the action on the merits. The purposes of a preliminary injunction are to protect the movant therefor, here only Dr. Larkin, from suffering irreparable injury during the pendency of the action and to preserve the court's power to render a meaningful decision after trial on the merits of the case. See 11 Wright and Miller, *Federal Practice and Procedure*, §2947, p. 423. A district court in granting a motion for a preliminary injunction has no power to enjoin all utilization of a statute. It has power only to enjoin the use of the statute against the party seeking the preliminary injunction.

### *C. These errors are serious and require the reversal of the judgment.*

Dr. Larkin's brief to this Court in support of his Motion to Dismiss or Affirm, pages 28 and 29, admits the existence of these errors, but characterizes them as "technical" and the members of the Board's objections to them as "hyper-technical." He ends his brief by claiming that no harm was done. Any improper assumption and exercise of power is a serious harm and particularly when, as here, it temporarily destroys or appreciably diminishes the power of a state to protect the health and welfare of its citizens.

These errors are not "technical." They strike at the very heart of state-federal relationships. The completely improper, baseless, careless, and casual declaration that a presumptively constitutional[4] state statute is unconstitutional in deciding a groundless and unsupported motion for a preliminary injunction and the preliminary enjoining of all utilization of that statute is the very type of "improvident statewide doom by a federal court of a state's legislative policy,"[5] which motivated Congress to pass the three-judge court act, 28 U.S.C. §2281. It is no better, however, to

4. The presumption of constitutionality of a state statute "is the postulate of constitutional adjudication." *New York v. O'Neill* (1959), 359 U.S. 1, 6, 79 S.Ct. 564, 3 L.Ed. 2d 585. As pointed out in *Mayo* (309 U.S. at 318 and 319), the mere presumption of constitutionality requires the denial of a motion for a preliminary injunction, except in extraordinary situations where findings of fact, based on *evidence*, support a conclusion of law that there is a substantial question of constitutionality presented. Here there was NO evidence at all.

In *O'Gorman & Young v. Hartford F. Ins. Co.* (1931) 282 U.S. 251, 257, 258, 51 S.Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163, Justice Brandeis wrote that when, as here, a statute falling within the police powers of the state is involved "the presumption of constitutionality *must prevail* in the absence of some *factual foundation of record* for overthrowing the statute."

5. *Phillips v. United States* (1941), 312 U.S. 246, 251, 61 S.Ct. 480, 85 L.Ed. 800, and *Moody v. Flowers* (1967), 387 U.S. 97, 101, 87 S.Ct. 1544, 18 L.Ed. 2d 643.



have three judges improperly "able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order"[6] than to have a single federal judge do so.

The statute here involved is an exercise of the state's police power to protect the health and welfare of its citizens.[7] As recognized in *Geiger v. Jenkins* (N.D. Ga. 1970), 316 F. Supp. 370, 373, which was affirmed in *Geiger v. Jenkins* (1971), 401 U.S. 985, 91 S.Ct. 1236, 28 L.Ed. 2d 525:

> "* * * The right to practice medicine is a conditional right which is subordinate to the state's power and duty to safeguard the public health, and it is the universal rule that in the performance of such duty and in the exercise of such power, the state may regulate and control the practice of medicine and those who engage therein, subject only to the limitation that the measures adopted must be *reasonable, necessary, and appropriate to accomplish the legislature's valid objective of protecting the health and welfare of its inhabitants. See* McNaughton v. Johnson, 242 U.S. 344, 37 S.Ct. 178, 61 L.Ed. 352 (1917); Dent v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889); 41 Am. Jur., Physicians and Surgeons, §§3-8. It is beyond dispute that the power of the State to regulate the practice of medicine includes the power to create an administrative board and vest in it the supervision of such regulation. Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935). * * *" (Emphasis added.)

6. *Kennedy v. Mendoza-Martinez* (1936), 372 U.S. 144, 154, 83 S.Ct. 554, 9 L.Ed. 2d 644.

7. *Barsky v. Board of Regents of N.Y.* (1954), 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829.

See, also, *Barsky v. Board of Regents of N.Y.* (1954), 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829.

Section 448.18 (7), Wis. Stats., grants to the Board its only power to suspend the license of a physician engaged in specifically defined immoral or unprofessional conduct. It is obviously "reasonable, necessary, and appropriate to accomplish the legislature's valid objective of protecting the health and welfare of its inhabitants." The district court's improper declaration of unconstitutionality and its improper preliminary enjoining of all utilization of the statute leaves a gaping hole in Wisconsin's already feeble defense of the health and welfare of its citizens against the activities of unscrupulous physicians.

The errors of the district court are very serious and, as in *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774, require reversal of the judgment.

## II. The *Per Se* Possession And Exercise By An Administrative Agency Of Both Statutory Powers To Investigate And To Adjudicate Is Not A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution.

In the performance of its statutory duty, sec. 448.17, Wis. Stats., to investigate, hear, and act on "practices inimical to public health" by a licensee, the Wisconsin Medical Examining Board conducted an ex parte investigative hearing into the medical practices of Dr. Larkin. Thereafter, but prior to the conclusion of the investigative hearing, it gave



notice to Dr. Larkin of a contested hearing[8] on the question of whether his license to practice medicine in Wisconsin should be temporarily suspended by the Board under the authority granted to it by sec. 448.18 (7), Wis. Stats., to temporarily suspend for no more than three months the license of a licensee engaged in "immoral or unprofessional conduct" as defined in sec. 448.18 (1), Wis. Stats. "Practices inimical to the public health" and "immoral or unprofessional conduct" are not the same thing, although, of course, the same acts may constitute both.

The record herein is devoid of any showing that, upon receipt of the Notice of Contested Hearing, Dr. Larkin appeared before the Board and asked that any or all members thereof disqualify themselves, for any reason, from conducting a contested hearing and adjudicating the question of whether or not his license should be temporarily suspended. Instead, and without any amendment of his amended complaint to include within its scope the subject of a contested hearing under sec. 448.18 (7), Wis. Stats., Dr. Larkin procured from the district court orders enjoining the conduct of the contested hearing.

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8. Under the provisions of ch. 227, Wis. Stats., and Wisconsin case law a "contested" case or hearing is one at which the subject must have previously been given "a clear and concise [written] statement of the issues" (227.09); he is entitled to be represented by counsel; the burden of proof is on his adversary, who is represented by an assistant attorney general; he has a right to cross-examine the witnesses against him and can present witnesses and other evidence in his behalf (227.10); an official record of the hearing, including all exhibits and testimony, must be kept (227.11); the decision must be in writing accompanied by findings of fact and conclusions of law (227.13); the decision must be served on the subject (227.14); the decision is subject to judicial review (227.15) and the scope of that review includes not only the content of the decision but also "the constitutionality of any act or of its application to him" (sec. 227.20); and pending the completion of judicial review, the decision of the agency may be stayed by the court (sec. 227.17).

See also *LeBow v. Optometry Examining Board* (1971), 52 Wis. 2d 569, 191 N.W. 2d 47, and *Kachian v. Optometry Examining Board* (1969), 44 Wis. 2d 1, 170 N.W. 2d 743.

The district court's decision granting the preliminary injunction reads:

> "* * * What we determined was that for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as §448.18 (7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decisionmaker, we concluded that it was unconstitutional and unenforceable.
>
> "* * *
>
> "* * * The state medical examining board does not qualify as such a decisionmaker. * * *" (Jurisdictional Statement App. 2, 3, 4.)

This, then, is NOT a decision based on the existence of any actual bias against Dr. Larkin by any or all members of the Board; it is NOT a decision based on the possession by any or all Board members of a direct personal or pecuniary interest in the outcome of the proposed contested hearing, and it is NOT a decision based on any claim that any or all members of the Board were illegally sitting as such or that the Board was illegally constituted.

The decision IS solely that, if the members of the Board perform their statutory duty to investigate practices inimical to public health by conducting an ex parte investigative hearing of the medical practices of a licensee, they cannot, consistent with procedural due process, also exercise their statutory right and duty to adjudicate, after a contested



hearing, whether the license of a licensee engaged in immoral or unprofessional conduct should be temporarily suspended.[9]

This never has been, is not, and never should be the law.

### *A. It has been uniformly held by this and other courts that mere possession and exercise of both an investigative and an adjudicative function by an administrative agency is not a violation of due process.*

#### 1. This Court has so held.

In *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010, reh. den. 334 U.S. 839, 68 S.Ct. 1492, 92 L.Ed. 1764, this Court found that members of the Federal Trade Commission, who on the basis of prior official investigations by them had concluded and publicly expressed the opinion that a certain cement industry trade practice was illegal, properly refused to disqualify themselves from hearing and passing on the same practice by members of that industry in contested proceedings to determine whether cease and desist orders should issue. In so concluding, this Court discussed the difference

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9. Although the decision refers to the members of the Board making an "investigation" there is no evidence in the record that any of them personally made an investigation in the sense of going out and searching out the facts from potential witnesses and other sources. In fact, none of the members, who are unpaid, part-time, practicing physicians from various parts of the state, did so. An agency employe, who is not a Board member, did all of the actual investigating. The members of the Board only investigated in that they conducted the investigative hearing authorized by sec. 448.17, Wis. Stats., at which the evidence gathered by the investigator was presented to them by an assistant attorney general in the form of the sworn testimony of witnesses and other evidence.

between an ex parte investigation and a contested hearing and also discussed the rule of necessity, both of which discussions are also applicable to the present case.

In addition to the disqualification question, the claim was made in the above-cited case that it was a violation of due process for the members of the Federal Trade Commission to adjudicate, after having conducted an ex parte investigation and having determined that the involved practice was illegal. This Court also rejected that argument and wrote (333 U.S. at 702, 703):

> "Marquette also seems to argue that it was a denial of due process for the Commission to act in these proceedings after having expressed the view that industry-wide use of the basing point system was illegal. A number of cases are cited as giving support to this contention. Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243, is among them. But it provides no support for the contention. In that case Tumey had been convicted of a criminal offense, fined, and committed to jail by a judge who had a direct, personal, substantial, pecuniary interest in reaching his conclusion to convict. A criminal conviction by such a tribunal was held to violate procedural due process. But the Court there pointed out that most matters relating to judicial disqualification did not rise to a constitutional level. Id., at page 523 of 273 U.S., at page 441 of 47 S.Ct., 71 L.Ed. 749, 50 A.L.R. 1243.
>
> "Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court."



This Court has also held in a number of deportation cases, including *Marcello v. Bonds* (1955), 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107, that the right to due process was not violated because the Immigration Service has investigative, prosecutorial, and adjudicative functions and because a special inquiry officer, who exercised the adjudicative function, was subject to supervision and control by officials having investigative and prosecutorial functions.

In *Pickering v. Board of Education* (1968), 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811, this Court refused to decide a late-blooming issue of procedural due process occasioned by "multiple functioning" of a school board "vis-a-vis appellant," but this Court did, in *Richardson v. Perales* (1971), 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842, quickly dispose of a claim comparable to the issue in this case and in a way contrary to the decision of the lower court herein.

In *Richardson* it was argued to this Court that there was a denial of due process because the hearing examiner who heard and decided the case was not "an independent hearing examiner" in that he also had responsibility for gathering the evidence. This Court wrote (402 U.S. at 410):

> "Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. *He acts as an examiner charged with developing the facts.* The 44.2% reversal rate for all federal disability hearings in cases where the state agency does not grant benefits * * * attests to the fairness of the system and refutes the implication of impropriety." (Emphasis added.)

"Developing the facts" is an investigative function and, therefore, this decision also is that combining investigative and adjudicative functions in a hearing examiner, let alone in a whole administrative agency, is not a denial of procedural due process.

There are some similarities, as well as glaring and decisive dissimilarities, between this appeal and that in *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488. In that case, this Court on the basis of considerations of equity, comity, and federalism vacated the judgment of a three-judge court in which that lower court had enjoined the members of the Alabama Optometry Board from conducting hearings on license revocation and from revoking the licenses of certain corporation-employed optometrists. This Court, however, agreed with the determination of the lower court that, under the unique facts of the case, the members of the Board were disqualified from proceeding with the hearings because of bias based on substantial pecuniary interest in the outcome of the proceedings. This Court, therein, carefully noted, at 93 S.Ct. 1698 and footnote 17, that it did not reach and was not deciding the here involved question of the extent to which an administrative agency may investigate and act and then, consistent with due process, sit as an adjudicative body.

The decisions of this Court, as illustrated above, are that it is not a violation of due process for an administrative agency to possess and exercise both investigative and adjudicative functions.

2. Other courts have so held.

There are a large number of lower federal court decisions on the question of the mixing of investigative, prosecutorial,



and adjudicative functions in an administrative agency, including boards and commissions, and on the propriety of the exercise of all such functions by the same agency or board. All of these cases have held that, in the absence of proof of actual bias, a direct personal, substantial, pecuniary interest in the outcome of the proceeding or a personal interest in an individual board member because of his prior involvement in an adversary capacity, it is not a violation of due process for the members of a board, commission, or other type of administrative agency to possess and exercise both the power to investigate and the power to adjudicate.[10]

The federal case most comparable to the present case is *Pangburn v. C.A.B.* (1st Cir. 1962), 311 F. 2d 349. In that case the Civil Aeronautics Board in the exercise of its statutory duty to investigate civil aircraft accidents did investigate and did issue a report indicating that an accident was caused by pilot error. The Board thereafter performed an adjudicative function in respect to the pilot involved in that accident by affirming the decision of an employe to

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10. For example, see *Duke v. North Texas State University* (5th Cir. 1973), 469 F. 2d 829, cert. den. 93 S.Ct. 2760; *Simard v. Board of Education of Town of Groton* (2d Cir. 1973), 473 F. 2d 988; *Villani v. New York Stock Exchange* (S.D. N.Y. 1972), 348 F. Supp. 1185; *Intercontinental Indus. Inc. v. American Stock Exchange* (5th Cir. 1971), 452 F. 2d 935; *Mack v. Florida State Board of Dentistry* (5th Cir. 1970), 430 F. 2d 862; *Belsinger v. District of Columbia* (D. D.C. 1969), 295 F. Supp. 159; *Lehigh Portland Cement Company v. F.T.C.* (E.D. Va. 1968), 291 F. Supp. 628; *Federal Trade Comm. v. Cinderella Career and Finishing Schools, Inc.* (D.C. Cir. 1968), 404 F. 2d 1308; *Wasson v. Trowbridge* (2d Cir. 1967), 382 F. 2d 807; *Securities and Exchange Commission v. R. A. Holman & Co.* (D.C. Cir. 1963), 323 F. 2d 284, cert. den. 375 U.S. 943; *Pangburn v. C.A.B.* (1st Cir. 1962), 311 F. 2d 349; *Amos Treat & Co. v. Securities and Exchange Commission* (D.C. Cir. 1962), 306 F. 2d 260; *Holt v. Raleigh City Board of Education* (4th Cir. 1959), 265 F. 2d 95, cert. den. 361 U.S. 818; *Trans World Airlines v. Civil Aeronautics Board* (D.C. Cir. 1958), 254 F. 2d 90; *United States ex rel. Dolenz v. Shaughnessy* (2d Cir. 1952), 200 F. 2d 288; *Belizaro v. Zimmerman* (3rd Cir. 1952), 200 F. 2d 282; and *Brinkley v. Hassig* (10th Cir. 1936), 83 F. 2d 351.

suspend the pilot's certificate for 90 days because of negligence. It was claimed that this combination of investigative and adjudicative functions in the Board denied to the pilot due process of the law since the Board could not be the required "impartial tribunal" in adjudicating because of its investigative activities and published opinion that the accident was due to pilot error. This claim was unanimously rejected by the court of appeals, which wrote, p. 356:

> "It is well settled that a combination of investigative and judicial functions within an agency does not violate due process. Belizaro v. Zimmerman, 200 F. 2d 282 (3rd Cir., 1952); United States ex rel. Catalano v. Shaughnessy, 197 F. 2d 65 (2nd Cir., 1952); Levers v. Berkshire, 159 F. 2d 689 (10th Cir., 1947); Roccaforte v. Mulcahey, 169 F. Supp. 360 (D.C. Mass. 1958), aff'd, per curiam, 1 Cir., 262 F. 2d 957; Brinkley v. Hassig, 83 F. 2d 351 (10th Cir., 1936), 2 Davis, Administrative Law Treatise, §13.02. See, Federal Trade Comm. v. Cement Institute, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). Indeed that provision of the Administrative Procedure Act which prohibits the same person from investigating and rendering a decision in the same matter, expressly excludes from its operation 'the agency * * * or any member or members of the body comprising the agency.' (5 U.S.C. §1004)."[11]

That court, then, considered various cases and, thereafter, wrote, p. 358, the following which is completely appropriate to the present case:

> "Upon examination of the foregoing cases, we cannot say that the mere fact that a tribunal has had contact with

11. 5 U.S.C. §1004 is now 5 U.S.C. §554 (d).



> *a particular factual complex* in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required. Particularly is this so in the instant case where the Board's prior contact with the case resulted from its following the Congressional mandate to investigate and report the probable cause of all civil air accidents. If we were to accept petitioner's argument, it would mean that because the Board obeyed the mandate of Section 701, it was thereupon constitutionally precluded from carrying out its responsibilities under Section 609." (Emphasis added.)

The completely irrational result of the decision in this case, which result was rejected by the court of appeals in *Pangburn*, is that if the Board performs its duty to investigate under sec. 448.17, Wis. Stats., it cannot perform its duty to adjudicate another question under sec. 448.18 (7), Wis. Stats., merely because it has been exposed to a "particular factual complex." The decision of the district court herein turns an investigation into an immunization of its subject against temporary suspension of his license even though he is endangering the health and welfare of the public by engaging in immoral or unprofessional conduct.

State supreme courts have also found no violation of due process in the mere *per se* mixture of functions within administrative agencies. In general, see 2 Davis, *Administrative Law Treatise*, §13.02, 1 Am. Jur. 2d, *Administrative Law*, §§77 and 78, and 97 A.L.R. 2d 1210 and the later case service thereto.[12]

12. Recent Wisconsin Supreme Court cases on this subject include *Kachian v. Optometry Examining Board* (1969), 44 Wis. 2d 1, 170 N.W. 2d 743, and *LeBow v. Optometry Examining Board* (1971), 52 Wis. 2d 569, 191 N.W. 2d 47.

*B. This district court's contrary decision is the result of misapplication and misconstruction of certain inapplicable decisions of this Court.*

The decision of the lower court cites *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656, and *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484, which deal with parole and probation revocation, for the proposition that one of the elements of minimal due process is an "independent decisionmaker." This is true, but it, then, inappropriately applied these cases to the present situation and determined that:

> "* * * The state medical examining board does not qualify as such decisionmaker. It cannot properly rule with regard to the merits of the same charges it investigated * * *." (Jurisdictional Statement App. 3, 4.)

This record in no way supports a conclusion that the Board proposed to "rule with regard to the merits of the same charges it investigated." The Board had merely been exposed to a "particular factual complex." Further, however, there is absolutely nothing in *Gagnon, Morrissey,* or *Goldberg v. Kelly* (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287, which involved termination of welfare benefits, which supports this determination by the lower court. These cases neither indicate that an administrative agency, such as the Medical Examining Board, cannot qualify as an independent decisionmaker nor do they have anything to say on the subject of the possession and exercise of both investigative and adjudicative functions by an administrative agency. They deal with *review of the decision* of an agency by the same agency, i.e., performing an adjudicative function to determine the correctness of its own prior adjudication or recommendation.



These cases stand for the proposition that review of the decision or recommendation of agency personnel to terminate welfare benefits or to revoke parole or probation must be conducted by some person within the agency other than the initial decisionmaker. This is made clear in *Goldberg* when this Court wrote (397 U.S. at 271):

> "* * * And, of course, an impartial decision maker is essential. * * * We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. *He should not, however, have participated in making the determination under review.*" (Emphasis added.)

In *Morrissey* this Court further explained (408 U.S. at 486) that:

> "* * * *The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them.* Goldberg v. Kelly found it unnecessary to impugn the motives of the caseworker to find a need for *an independent decisionmaker to examine the initial decision.*
>
> "This independent officer need not be a judicial officer. The granting and revocation of parole are matters traditionally handled by administrative officers. In Goldberg, the Court pointedly did not require that the hearing on termination of benefits be conducted by a judicial officer or even before the traditional 'neutral and detached' officer; it required only that the hearing be conducted by some person *other* than one initially dealing with the case. * * *" (Emphasis added.)

What *Goldberg, Morrissey,* and *Gagnon* mandate in the present case is that IF the members of the Board had made a decision that the medical license of Dr. Larkin should be

temporarily suspended, they could not, consistent with minimal due process requirements, review the correctness of their own decision. Under these circumstances, the members of the Board would not be the required "independent decisionmaker" because they would be reviewing their own determination. Of course, none of this happened in the present case since there was no prior decision by the Board to temporarily suspend Dr. Larkin's license to practice medicine in Wisconsin.

Further, it would not have happened, since the very subsection of the Wisconsin statutes, which the lower court erroneously declared to be unconstitutional, requires review by an independent decisionmaker of any decision by the Board to temporarily suspend a license to practice medicine. Section 448.18 (7), Wis. Stats., concludes with the following provision:

> "* * * All examining board actions under this subsection shall be subject to review under ch. 227."

Chapter 227, Wis. Stats., provides for judicial review of administrative agency decisions by the Circuit Court of Dane County, Wisconsin. A circuit judge is not only an "independent decisionmaker" as required by *Goldberg, Morrissey,* and *Gagnon,* but he is a "neutral and detached" judicial officer, which is specially not required. Dr. Larkin, therefore, would have received even more than minimal due process and the very subsection of the statutes improperly as well as erroneously declared by the lower court to be unconstitutional because it did not provide for an "independent decisionmaker," clearly and unequivocally provides even more than the required "independent decisionmaker."

Federal cases subsequent to *Goldberg,* holding that due process was not violated in a situation where the administrative decisionmaker had also performed an investigative



function, include *Richardson v. Perales* (1971), 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842, and *Duke v. North Texas State University* (5th Cir. 1973), 469 F. 2d 829, cert. den. 93 S.Ct. 2760.

### *C. Even though the Board had conducted an ex parte investigative hearing into the medical practices of a licensee, it is a "fair tribunal" to adjudicate whether the license of the licensee should be temporarily suspended.*

The actual question in this case was misconceived by the district court. It is not whether the members of the Board are an "independent decisionmaker," as required by *Goldberg, Morrissey,* and *Gagnon,* for the review of a decision previously made by the Board. Instead, the actual question is whether the Board is the "fair tribunal" or the "impartial tribunal" required by due process to make an initial decision on whether Dr. Larkin's license to practice medicine in Wisconsin should be temporarily suspended.

#### 1. The Board meets the standards for determining a "fair tribunal" in a criminal prosecution and, therefore, must be a "fair tribunal" to adjudicate at the proposed contested hearing.

Because of the nature and seriousness of the potential deprivation of life, liberty, and property involved in a criminal prosecution, the very strictest standards in determining what is a "fair tribunal" are the standards applied to a judge

in a criminal prosecution. This Court has prescribed such standards in *Tumey v. Ohio* (1927), 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243, and *In Re Murchison* (1955), 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942. In *Tumey* this Court wrote (273 U.S. 510, 523):

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion. Wheeling v. Black, 25 W. Va. 266, 270. But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a *direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.*" (Emphasis added.)

In *Murchison* this Court borrowed some *dictum* from *Tumey* and included it in the following statement of standards for determining a "fair tribunal" in a criminal prosecution. It wrote, 349 U.S. at 136:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires *an absence of actual bias* in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end *no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.* That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible *temptation* to the average man as a judge . . . *not to hold the balance nice, clear and true* between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 US 510, 532, 71 L ed 749, 758, 47 S Ct 437, 50 ALR 1243. * * *" (Emphasis added.)



See, also, *Ward v. Village of Monroeville, Ohio* (1972), 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed. 2d 267, in which this Court held that a traffic violator who was forced to stand trial before a mayor whose court fines, forfeitures, costs and fees provided a substantial portion of the village's funds was denied a trial before a disinterested and impartial judicial officer as required by the Due Process Clause.

Combining these standards, a "fair tribunal" in a criminal prosecution is one free of actual bias, with no direct, personal, substantial pecuniary interest in the outcome and with no other interest strong enough to tempt a judge to be other than fair and impartial in making an adjudication. The situation here, i.e., the mere exposure to a factual complex gained during the performance of an official duty, has never been held to create in a judge an interest strong enough to "offer a possible temptation" "not to hold the balance nice, clear and true" between the parties.

A judge who issued an arrest warrant after an ex parte presentation to him of facts showing probable cause to arrest a defendant has never been held to be an unfair tribunal to adjudicate, after a contested preliminary hearing, whether that defendant should be bound over for trial. In fact, it is not a violation of due process for the same judge to issue an arrest warrant, preside at a contested preliminary hearing, adjudicate that there is probable cause to bind over the defendant for trial and, then, preside at a trial. *State v. Knoblock* (1969), 44 Wis. 2d 130, 170 N.W. 2d 781; *Waupoose v. State* (1970), 46 Wis. 2d 257, 174 N.W. 2d 503; and *Voigt v. State* (1973), 61 Wis. 2d 17, 211 N.W. 2d 445.

In the present case, the members of the Board did not possess any actual bias against Dr. Larkin, they did not

possess any direct, personal, substantial pecuniary interest in the outcome of the proceeding, and the mere fact that they had some exposure to facts about his medical practices as a result of an ex parte investigation conducted by them is not an interest strong enough to tempt them to be other than fair and impartial in making an adjudication on whether Dr. Larkin's license to practice medicine in Wisconsin should be temporarily suspended. The latter is established by the decision of this Court in *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010, quoted at length at page 26, *supra*.

The members of the Board herein meet the standards set for determining a "fair tribunal" in a criminal prosecution. They certainly, then, are a "fair tribunal" to make the administrative adjudication here involved.

2. These standards, however, should not apply in determining whether a licensing board is a "fair tribunal" to suspend or revoke a license.

It is a violation of due process for a licensing board to adjudicate if all of its members have a direct, personal, substantial pecuniary interest in the outcome of a proceeding. *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488. Aside from this standard, the other standards for determining a "fair tribunal" in a criminal prosecution probably should not apply to licensing boards in making adjudications on whether professional and occupational licenses should be suspended or revoked. Since the Board herein meets all of the standards for a "fair tribunal" in a criminal prosecution, however, argument to the above effect



is irrelevant. Even so, some reasons for the distinction should be briefly suggested.

A licensing suspension or revocation proceeding is not a criminal prosecution. In the here enjoined contested hearing, no one was seeking to execute, incarcerate, or fine Dr. Larkin. The greatest deprivation which could result from the hearing is that the Wisconsin license of Dr. Larkin, who was also licensed to practice medicine in at least one other state, would be suspended for 3 months, subject to an additional suspension of another 3 months. Sec. 448.18 (7), Wis. Stats. This potential deprivation is miniscule compared with that in a criminal prosecution and the tribunal which may so adjudicate need not be subjected to the same strict scrutiny as in a criminal tribunal.

In a criminal prosecution one is dealing with the possible deprivation of fundamental rights not granted by a state. A license to practice medicine, to which no person has a constitutional right, is, according to *Barsky v. Board of Regents of N.Y.* (1954), 347 U.S. 442, 451, 74 S.Ct. 650, 98 L.Ed. 829, "a privilege granted by the State under its substantially plenary power to fix the terms of admission." The state, through a licensing board, grants a license to practice medicine to qualified applicants. This grant, as recognized in *Barsky*, is a conditional one and the state licensing board which made the grant can properly suspend or revoke a license for violation of the conditions of its issuance without the exact same type of "fair tribunal" required in a criminal prosecution in which the state is attempting to deprive a person of rights not granted by it.

If a judge, for some reason, is not a "fair tribunal" to try a criminal prosecution, there are other judges who can be substituted for him. If, for any reason, the total or a

majority of the membership of a licensing board or regulatory commission, et al., is not a "fair tribunal" there is no substitute. The "rule of necessity" has often and properly been applied in these circumstances to make a less than perfect tribunal a "fair tribunal."[13] This is particularly true in situations where, as here, there are the built-in safeguards of judicial review of the decision (sec. 448.18 (7), Wis. Stats.) and of the constitutionality of "any act and its application" to the licensee (sec. 227.20, Wis. Stats.); the decision may be stayed pending judicial review (sec. 227.17, Wis. Stats.), and the reviewing court can, in recognition of possible bias, strictly scrutinize the administrative decision.[14]

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13. There is reference to the rule of necessity in *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010. This Court applied the rule in *United States v. Morgan* (1941), 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429.

Lower federal court decisions applying the rule of necessity include *Duffield v. Memorial Hospital Ass'n of Charleston* (S.D. W.Va. 1973), 361 F. Supp. 398; *Federal Home Loan Bank Bd. v. Long Beach Fed. S. & L. Ass'n* (9th Cir. 1961), 295 F. 2d 403; *Marquette Cement Mfg. Co. v. Federal Trade Commission* (7th Cir. 1945), 147 F. 2d 589; and *Brinkley v. Hassig* (10th Cir. 1936), 83 F. 2d 351.

State cases involving application of the rule of necessity to medical licensing suspension or revocation proceedings include: *Seidenberg v. New Mexico Bd. of Medical Examiners* (1969), 80 N.Mex. 135, 452 P. 2d 469; *Rose v. State Board of Registration for Healing Arts* (Mo. 1965), 397 S.W. 2d 570; *State of Montana ex rel. Yuhas v. Board of Medical Examiners* (1959), 135 Mon. 381, 339 P. 2d 981; and *Board of Medical Examiners v. Steward* (1954), 203 Md. 574, 102 A. 2d 248.

See also Davis, *Administrative Law Treatise*, §12.04.

14. This procedure is advocated in Davis, *Administrative Law Treatise* §12.04, p. 165. Wisconsin recognizes a strict scrutiny obligation on the reviewing court when an administrative agency is biased. *Wisconsin Telephone Co. v. Public Service Comm.* (1939), 232 Wis. 274, 329, 287 N.W. 122, 287 N.W. 593, cert. den. 309 U.S. 657.



*D. If the decision of the district court is correct, all grants of adjudicative power to an administrative agency possessing and exercising investigative powers are unconstitutional.*

The very nature of administrative agencies at all levels of government is that they possess and exercise a variety of powers, normally including investigative and adjudicative powers. If the decision of the lower court in this case is correct, it will have a major and destructive impact on all administrative agencies. It will also have a major and destructive impact on the conduct of the people's increasingly complex public business, for it is to handle such public business that administrative agencies were created, have been developed, and have grown in size and scope of responsibility and activity. Although administrative agencies have many faults, the decision in this case, just as the comparatively miniscule "advocate-judge-multiple-hat suggestion" rejected by this Court in *Richardson v. Perales* (1971), 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed. 2d 842:

> "* * * assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. * * *"

The decision in this case is NOT that it is a violation of due process for an agency employe or an individual board member who investigated a matter to act as an adjudicator of the same matter; it is NOT that it is a violation of due process for an individual member of a board or commission to refuse to disqualify himself or for the board or commission to refuse to disqualify him, when he is, in fact, disqualified by actual bias, direct, personal, or pecuniary interest in the outcome, prior personal involvement as an

adversary in the same matter, et al., and it is NOT that it is a violation of due process for an illegally constituted board or commission to adjudicate. The decision here IS that the mere possession and exercise of both investigative and adjudicative powers by the same agency is a violation of due process.

If this is correct, all local, state, and federal legislative grants of power to adjudicate to agencies also possessing the power to investigate the same subject or subject matter are unconstitutional as a violation of due process. This includes every major federal administrative agency and even those whose adjudications fall within the coverage of the Federal Administrative Procedure Act.

The Federal Administrative Procedure Act recognizes that an administrative agency may possess and exercise both investigative and adjudicative powers and functions. On the basis of this fact, the present decision also makes the APA unconstitutional even though §554 (d) thereof does attempt to insulate certain adjudications[15] of covered agencies,[16] which adjudications are made by agency employes, from influence by other employes possessing and exercising investigative and prosecuting powers and functions.[17]

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15. That subsection does not apply "(A) in determining applications for initial licenses; (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or (C) *to the agency or a member or members of the body comprising the agency.*" 5 U.S.C. §554 (d).

16. Some agencies, such as the Immigration Service, are not covered by the APA. See *Marcello v. Bonds* (1955), 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107.

17. In fact, under the provisions of the Federal Administrative Procedure Act and contrary to the decision in this case, it is entirely proper for the members of the Wisconsin Medical Examining Board to conduct a contested hearing and to adjudicate whether or not Dr. Larkin's license to practice medicine in Wisconsin should be temporarily suspended after they had conducted an ex parte investigation of his medical practices. See note 15, *supra*.



State administrative agencies, as well as Congress in the Federal Administrative Procedure Act, have recognized that some bias may arise because of their possession and exercise of both investigative and adjudicative powers. The remedy for this has been, when agency size so permits, to make an internal separation of functions within the agency.

The erroneous decision in this case does not allow for this reasonable remedy, since it holds that the mere possession and attempted exercise of an adjudicative power violates due process if the agency also possesses and has exercised an investigative power. This not only never has been and is not the law, but it cannot be the law without destroying administrative agencies as they are now structured by Congress and by the state legislatures.

## III. Under The Circumstances Of This Case, The District Court Had No Discretion To Issue A Preliminary Injunction, But If So, It Abused Its Discretion In So Doing.

A preliminary injunction is an extraordinary equitable remedy originally "fashioned for settling an ordinary clash of private interest."[18] The power to issue such an injunction is subject to abuse and particularly when, as here, it is used to enjoin the enforcement of a state statute. The federal courts must exercise their power to issue a preliminary injunction with great caution and only when the availability of that relief and the reason and necessity therefor is clearly established by the moving party. In general, see 43 C.J.S., *Injunctions*, §15, p. 426; 7 *Moore's Federal*

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18. *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 322, 60 S.Ct. 517, 84 L.Ed. 774.

*Practice*, §65.18 [3]; and 11 Wright and Miller, *Federal Practice and Procedure*, §2948, pp. 428, 429.

*A. The district court herein possessed no discretion to issue a preliminary injunction.*

1. This Court has established the principles governing the availability of preliminary injunctive relief and the grounds for the granting of a motion therefor.

Various decisions of this Court have established or recognized the principles governing the availability of preliminary injunctive relief and the grounds for the granting of a motion therefor. An equitable remedy such as a preliminary injunction is not available when there is an adequate remedy at law.[19] Further, when, as here, state administrative proceedings are involved, which proceedings call into play administrative expertise, discretion, and fact finding, normally preliminary injunction is not available in the absence of exhaustion of administrative remedies. There are many decisions to this effect, and *contra*. See the discussion on this subject in *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488. See also, *Sampson v. Murray* (1974), — U.S. — , 94 S.Ct. 937, 39 L.Ed. 2d 166.

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19. *Terrace v. Thompson* (1923), 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Henneford v. Northern Pac. Ry. Co.* (1938), 303 U.S. 17, 58 S.Ct. 415, 82 L.Ed. 619; *Ex Parte Fahey* (1947), 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041; *Toomer v. Witsell* (1948), 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460; *Alabama Public Service Com'n v. Southern Ry. Co.* (1951), 341 U.S. 363, 71 S.Ct. 775, 95 L.Ed. 1016; *Beacon Theatres, Inc. v. Westover* (1959), 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988; *Younger v. Harris* (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669; et al.



If there is no adequate remedy at law and there has been an exhaustion of administrative remedies, if required, the grounds for or factors to be considered in determining whether to grant a motion for preliminary injunction have been established by the decisions of this Court. First, there must be "irreparable," "grave," "certain" injury to the movant if the requested relief is not granted.[20] Second, the question presented by the action must be "grave," "substantial," etc.,[21] i.e., there must be a reasonable probability or likelihood of success on the merits. As stated in *Terrace v. Thompson* (1923), 263 U.S. 197, 214, 44 S.Ct. 15, 68 L.Ed. 255, however:

"The unconstitutionality of a state law is not, of itself, ground for equitable relief in the courts of the United States. * * *" [22]

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20. *Terrace v. Thompson* (1923), 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Massachusetts State Grange v. Benton* (1926), 272 U.S. 525, 47 S.Ct. 189, 71 L.Ed. 387; *Ohio Oil Co. v. Conway* (1929), 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972; *State Corp. Commission v. Wichita Gas Co.* (1934), 290 U.S. 561, 54 S.Ct. 321, 78 L.Ed. 500; *Gibbs v. Buck* (1939), 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111; *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774; *Watson v. Buck* (1941), 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416; *Toomer v. Witsell* (1948), 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460; *Beacon Theatres, Inc. v. Westover* (1959), 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988; *Cameron v. Johnson* (1968), 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed. 2d 182; *Younger v. Harris* (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669; *Sampson v. Murray* (1974), — U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166.

21. *Ohio Oil Co. v. Conway* (1929), 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972; *Massachusetts State Grange v. Benton* (1926), 272 U.S. 525, 42 S.Ct. 189, 71 L.Ed. 387; *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774; and many others.

22. The disposition of *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488, is consistent with this holding.

Further, when, as here, injunction against the enforcement or operation of a state or federal statute is involved, the granting of the relief sought must not cause undue harm to the public interest.[23]

2. The moving party has the burden of showing, by evidence, the availability of injunctive relief in his case and of establishing grounds for the granting of his motion.

The party seeking injunctive relief has the burden of showing, by evidence placed in the record, his eligibility for it and of establishing adequate grounds for the granting of his motion.[24] This burden and the decisions of this Court cited above mean that in the present case and before a preliminary injunction enjoining the enforcement and operation of a state statute could properly issue, Dr. Larkin had to prove to the Court or persuade it by proper evidence[25] that:

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23. *Pennsylvania v. Williams* (1935), 294 U.S. 176, 55 S.Ct. 380, 79 L.Ed. 841; *Virginian Ry. Co. v. System Federation* (1937), 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; *Hecht Company v. Bowles* (1944), 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754; *Yakus v. United States* (1944), 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834; et al.

24. See such cases as *Railroad Commission of California v. Pacific Gas and Electric Co.* (1938), 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319; *Illinois Commerce Commission v. Thomson* (1943), 318 U.S. 675, 63 S.Ct. 834, 87 L.Ed. 1075; *Sampson v. Murray* (1974), — U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166.

25. Counsel's briefs and letters to the court are not "evidence" and are not substitutes for evidence. They, further, are not a part of the record of the case.



a) he had no adequate remedy at law;

b) he had exhausted his administrative remedies;

c) he would suffer irreparable and certain harm if the requested relief was not granted;

d) he had a reasonable probability of success on the merits; and

e) such relief would not cause undue harm to the public interest.

3. Since the moving party herein completely failed to establish, by evidence, both the availability of such relief and grounds for the granting of his motion, the district court had no discretion to grant the motion.

The evidence in support of a motion for a preliminary injunction is normally presented by the moving party at a hearing and through the sworn testimony of the moving party and other witnesses. It may, however, be in the form of proper affidavits and other admissible written materials. See generally, 11 Wright and Miller, *Federal Practice and Procedure*, §2949, p. 469, et seq., and 7 *Moore's Federal Practice*, §65.04 [3].

In the present case, however, Dr. Larkin presented ABSOLUTELY NO EVIDENCE in any shape or form to the court, which evidence established any, let alone all, of the above-mentioned requirements for the granting of his motion for a preliminary injunction. There was no evidentiary hearing and there were no affidavits or other written evidence presented by Dr. Larkin which in any way provided

a factual basis showing the availability of equitable relief in this case or a factual basis supporting the granting of the motion.

In *Sampson v. Murray* (1974), — U.S. — , 94 S.Ct. 937, 39 L.Ed. 2d 166, this Court reversed the granting of equitable relief. In so doing, it pointed out that proof of actual irreparable injury was necessary and that (94 S.Ct. at 952):

> "* * * the record before us indicates that no witnesses were heard on the issue of irreparable injury, that respondent's complaint was not verified, and that the affidavit she submitted to the District Court did not touch in any way upon considerations relevant to irreparable injury. We are therefore somewhat puzzled about the basis for the District Court's conclusion that respondent 'may suffer irreparable injury.' * * *"

Here, also, no witnesses were heard on the issue of irreparable injury or any other issue; the amended complaint was not only unverified but the relief here granted did not even fall within the subject matter of that complaint; Dr. Larkin personally submitted no affidavits in support of his motion and the only affidavits which were submitted did not touch upon considerations relevant to irreparable injury or any other issue listed above. Further, there not only was no finding of fact and conclusion of law on the subject of "irreparable injury" but there were no findings of fact and adequate conclusions of law, at all, despite the requirements of Rule 52 (a), FRCP.

Under these circumstances, i.e., the complete and total failure of the moving party to present any evidence showing the availability of preliminary injunctive relief in this case and establishing grounds for the granting of his motion, the district court had no discretion to and could not properly grant the motion.



*B. If any discretion to grant the motion was possessed by the district court, it abused its discretion.*

The district court herein issued a preliminary injunction. It did this on the basis of a motion (App. 46, 47), which motion did not state "with particularity the grounds therefor," as required by Rule 7 (b), FRCP, which motion was outside the scope of the subject matter of the action (App. 18-24) and which motion did not even seek the broad relief actually granted (App. 46, 47).

The district court granted the motion despite the total absence of any evidence in any form showing that the extraordinary relief sought was available in this action. It also granted the motion despite the total lack of even an allegation that grounds for its granting existed and in the total absence of any evidence in any form establishing any ground for the issuance of a preliminary injunction.

The district court, further, made no findings of fact and conclusions of law, as required by Rule 52 (a), FRCP, either as such or in the alternative form of its decision (Jurisdictional Statement App. 2-4).[26] It, then, entered a judgment, which does not even accurately reflect the content of its decision (Jurisdictional Statement App. 5), and did so without adequate compliance with Rule 65 (d), FRCP, and with no recognition of the content of Rule 65 (c), FRCP (Jurisdictional Statement App. 5).

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26. This Court has many times pointed out the necessity and importance of compliance with Rule 52 (a) when a motion for interlocutory injunction is refused or granted. See, for example, *Sampson v. Murray* (1974), — U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166; *Hatahley v. United States* (1956), 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065; *Kelley v. Everglades Drainage District* (1943), 319 U.S. 415, 63 S.Ct. 1141, 87 L.Ed. 1485; and *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774.

The judgment entered improperly and erroneously declared a presumptively valid state statute unconstitutional in the complete absence of any evidence to rebut the presumption and support the declaration and, then, improperly and erroneously gave the unsought relief of preliminarily enjoining *all* utilization of the state statute (Jurisdictional Statement App. 5).

This is an abuse of any discretion that the district court did possess. In fact, these circumstances demonstrate a complete lack of fundamental fairness to the members of the Board and to the citizens of the State of Wisconsin whom they represent.

## CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the district court must be reversed and the case remanded with directions to dismiss.

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July 25, 1974

26 1974
MICHAEL RODAK, JR., CLERK

No. 73-1573

# In the Supreme Court of the United States

OCTOBER TERM, 1973

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A.J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin,

*Appellants,*

vs.

DUANE LARKIN, M.D.,

*Appellee.*

On Appeal from the United States District Court for the Eastern District of Wisconsin

## BRIEF OF APPELLEE

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# INDEX


PAGE

Statutes Involved ..... 1

Question Presented for Review ..... 6

Statement of the Case ..... 7

Argument ..... 22

Due Process Of Law Is Violated When The Same Persons Within An Administrative Agency Propose To Be The Judges Of Charges Which They Have Preferred After An Extensive Investigation, Similar To An Investigation Made By A Grand Jury, And After They Have Unanimously Concluded That Probable Cause Exists For Prosecution Of The Person Under Investigation And Have Unanimously Concluded Each And Every Issue To The Point Where They Have Made Findings Of Fact And Conclusions Of Law Tha. His License Should Be Revoked ..... 22

Conclusion ..... 34


## AUTHORITIES CITED

*Cases*


American Cyanamid Company v. FTC, 362 F.2d 757 (6th Cir. 1966) ..... 33

Amos Treat & Co., Inc. v. SEC, 306 F.2d 260 (D.C. 1962) ..... 33

Babbitz v. McCann, 310 F.Supp. 293 (E.D. Wis. 1970) 7

Bloom v. Illinois, 391 U.S. 194 (1968) ..... 26

Board of Regents v. Roth, 408 U.S. 564 (1972) ..... 24

Doe v. Bolton, 410 U.S. 179 (1973) ..... 9

PAGE

Gagnon v. Scarpelli, 411 U.S. 778 (1973) ..... 27

Gibson v. Berryhill, 411 U.S. 564 (1973) ..... 28, 32

Glass v. Mackie, 370 Mich. 482, 122 N.W.2d 651 (1963) .. 33

Goldberg v. Kelly, 397 U.S. 254 (1970) ..... 30

Goldberg v. Kelly, 397 U.S. 261 ..... 31

Graham v. Richardson, 403 U.S. 365 (1971) ..... 25

Hilboldt v. Wis. R. E. Brokers' Bd., 28 Wis.2d 474, 137 N.W.2d 482 (1965) ..... 28

In re Murchison, 349 U.S. 133 (1955) ..... 25

In Re Ruffalo, 390 U.S. 544 (1968) ..... 24-25

Kelly v. Wyman, 294 F.Supp. 893 ..... 31

Kennan v. Nichol, 326 F.Supp. 613 (1971) *aff'd.*, 404 U.S. 1055 (1971) ..... 7

Kennan v. Warren, 328 F.Supp. 525 (1971) ..... 7, 8

Larkin v. Bruce, 352 F.Supp. 1076 (E.D. Wis. 1972) .... 9

Larkin v. McCann, et al., No. 71-C-671 (E.D.Wis.) .... 7, 8

Larkin v. Withrow, 368 F.Supp. 793, 794 (E.D. Wis. 1973) ..... 17, 18

Mack v. Florida State Board of Dentistry, 296 F.Supp. 1259 (S.D. Fla. 1969), aff. and vac'd. 430 F.2d 862 (5th Cir. 1970); *cert. den.* 401 U.S. 954 (1971) ..... 33

Meyer v. Nebraska, 262 U.S. 390 (1923) ..... 24

Morrissey v. Brewer, 408 U.S. 471 (1972) ..... 25, 27

Offutt v. United States, 348 U.S. 11 (1954) ..... 26



PAGE

Pickering v. Board of Education, 391 U.S. 563 (1968) .. 26

Richardson v. Perales, 402 U.S. 389 (1971) ..... 23

Roe v. Wade, 410 U.S. 113 (1973) ..... 9

Samuels v. Mackell, 401 U.S. 66 (1971) ..... 30

Sampson v. Murray, —— U.S. ——, 39 L.Ed.2d 166 (1974) ..... 32

Texaco v. FTC, 336 F.2d 754 (D.C. 1964) ..... 33

Trans World Airlines v. CAB, 254 F.2d 90 (D.C. 1958) 33

State ex rel. Bruce v. Larkin, 346 F.Supp. 1065 (E.D. Wis. 1972) ..... 8

Wasson v. Trowbridge, 382 F.2d 807 (2nd Cir. 1967) .... 27

Younger v. Harris, 401 U.S. 37 (1971) ..... 30

*Statutes*

Wis. Stats. §227.08 ..... 10

§448.02(1) ..... 1, 28

§448.02(4) ..... 2, 28

§448.16(1) ..... 2, 28

§448.17 ..... 2

§448.18(1) ..... 3, 28

§448.18(2) ..... 4

§448.18(7) ..... 5

§448.23(1) ..... 5, 29

§448.23(2) ..... 6

28 U.S.C. § 2284(5) ..... 8

# In the
# Supreme Court of the United States

OCTOBER TERM, 1973

## No. 73-1573

**HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A.J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin,**

*Appellants,*

vs.

**DUANE LARKIN, M.D.,**

*Appellee.*

On Appeal from the United States District Court for the Eastern District of Wisconsin.

## BRIEF OF APPELLEE

## THE STATE OF WISCONSIN STATUTES INVOLVED

**§ 448.02 (1)**

No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery, or

osteopathy, or any other system of treating the sick as the term "treat the sick" is defined in s. 445.01 (1) (a), without a license or certificate of registration from the examining board, except as otherwise specifically provided by statute.

**§ 448.02 (4)**

No person shall practice medicine, surgery or osteopathy, or any other system of treating bodily or mental ailments or injuries of human beings, under any other Christian or given name or any other surname than that under which he was originally licensed or registered to practice in this or any other state, in any instance in which the examining board, after a hearing, finds that practicing under such changed name operates to unfairly compete with another practitioner or to mislead the public as to identity or to otherwise result in detriment to the profession or the public. This subsection does not apply to a change of name resulting from marriage or divorce.

**§ 448.16 (1)**

Sections 448.02 to 448.08, shall not apply to commissioned physicians of the medical corps of one of the armed services or the federal health service of the United States or to medical or osteopathic physicians of other states or countries in actual consultation with resident licensed practitioners of this state, nor to the gratuitous prescribing and administering of family remedies or to treatment rendered in an emergency.

**§ 448.17**

The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under s. 448.06, that are inimical to the



public health. The examining board shall have the power to warn and to reprimand, when it finds such practice, and to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute, and the attorney general may aid the district attorney in the prosecution thereof.

**§ 448.18 (1)**

"Immoral or unprofessional conduct" as used in this section mean: (a) Procuring, aiding or abetting a criminal abortion; (b) advertising in any manner either in his own name or under the name of another person or concern, actual or pretended, in any newspaper, pamphlet, circular, or other written or printed paper or document the curing of venereal diseases, the restoration of "lost manhood", the treatment and curing of private diseases peculiar to men or women, or the advertising or holding himself out to the public in any manner as a specialist in diseases of the sexual organs, or diseases caused by sexual weakness, self-abuse or excessive indulgences, or in any diseases of a like nature or produced by a like cause, or the advertising of any medicine or any means whatever whereby the monthly periods of women can be regulated or the menses reestablished, if suppressed, or being employed by or in the service of any person, or concern, actual or pretended so advertising; (c) the obtaining of any fee; or offering to accept a fee on the assurance or promise that a manifestly incurable disease can be or will be permanently cured; (d) wilfully betraying a professional secret; (e) indulging in the drug habit; (f) conviction of an offense involving moral turpitude; (g) engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public.

**§ 448.18 (2)**

(2) Upon verified complaint in writing to the district attorney charging the holder of a license or certificate of registration from the examining board or chiropractic examining board with having been guilty of immoral or unprofessional conduct or with having procured his certificate or license by fraud or perjury, or through error, the district attorney shall bring civil action in the circuit court against the holder and in the name of the state as plaintiff to revoke the license or certificate. The court may appoint counsel to assist the district attorney and either party may demand a jury. No one shall be privileged from testifying fully or producing evidence, but he shall not be prosecuted or subject to penalty on account of anything about which he so does, except for perjury in so doing. If the court or the jury finds for the plaintiff, judgment shall be rendered revoking or suspending the license or certificate and the clerk of the court shall file a certified copy of the judgment with the examining board or the chiropractic examining board. The costs shall be paid by the county, but if the court determines that the complaint made to the district attorney was wilful and malicious and without probable cause, it shall enter judgment against the person making the complaint for the costs of the action, and payment of the same may be enforced by execution against the body as in tort actions.

(3) When any person licensed or registered by the examining board is convicted of a crime committed in the course of his professional conduct, the clerk of the court shall file with the examining board a certified copy of the information and of the verdict and judgment, and upon such filing the examining board shall revoke or suspend the license or certificate. The examining board



shall also revoke or suspend any such license or certificate upon satisfactory proof being made of the conviction of such license or certificate holder in a federal court of a crime committed in the course of his professional conduct. The action of the examining board in revoking or suspending such license or certificate may be reviewed ch. 227.

**§ 448.18 (7)**

(7) A license or certificate of registration may be temporarily suspended by the examining board, without formal proceedings, and its holder placed on probation for a period not to exceed 3 months where he is known or the examining board has good cause to believe that such holder has violated sub. (1). The examining board shall not have authority to suspend a license or certificate of registration, or to place a holder on probation, for more than 2 consecutive 3-month periods. All examining board actions under this subsection shall be subject to review under ch. 227.

**§ 448.23 (1)**

**448.23 Fee splitting between physicians and others.**

(1) SEPARATE BILLING REQUIRED. Any physician who renders any medical or surgical service or assistance whatever, or gives any medical, surgical or any similar advice or assistance whatever to any patient, physician, corporation, or to any other institution or organization of any kind, including a hospital, for which a charge is made to such patient receiving such service, advice or assistance, shall render an individual statement or account of his charges therefor directly to such patient, distinct and

separate from any statement or account by any physician or other person, who has rendered or who may render any medical, surgical or any similar service whatever, or who has given or may give any medical, surgical or similar advice or assistance to such patient, physician, corporation, or to any other institution or organization of any kind, including a hospital.

**§ 448.23 (2)**

(2) PHYSICIAN PARTNERSHIP PERMITTED. Notwithstanding any other provision in this section, it is lawful for 2 or more physicians, who have entered into a bona fide partnership for the practice of medicine, to render a single bill for such services in the name of such partnership.

## QUESTION PRESENTED FOR REVIEW

Did the United States District Court for the Eastern District of Wisconsin abuse its discretion when, sitting as a three-judge court, it entered an interlocutory injunction preventing the appellants from engaging in a hearing to suspend the license of the appellee to practice medicine in the State of Wisconsin for six (6) months when the persons who would be the judges at the hearing were the very same persons who personally investigated the charges and had determined that the appellee had violated some laws regulating medicine and that there was probable cause to believe that the appellee had violated the provisions of the laws regulating the medical practice in Wisconsin, thus making the appellants the judges of the charges which they had investigated and brought?



## STATEMENT OF THE CASE

Although this case on paper commenced on July 6, 1973, it has its genesis in the stormy litigation in Wisconsin surrounding the practice of abortion.

In 1970, a three-judge court sitting in the Eastern District of Wisconsin declared the Wisconsin abortion statute unconstitutional. *Babbitz* v. *McCann*, 310 F.Supp. 293 (E. D. Wis. 1970), vac. on other grounds, 402 U.S. 903 (1971). That decision triggered a wave of resistance and a concerted effort by the Attorney General of Wisconsin, the District Attorney in Milwaukee county, the District Attorney in Dane County (Madison) and these appellants to defy the decision of the United States District Court by threatening all members of the medical profession who engaged in the practice of abortion. The officials of the State of Wisconsin were so successful in their effort that only two doctors engaged in administering abortions in a public manner, Dr. Alfred Kennan in Madison, Wisconsin and Dr. Duane Larkin, the appellee here, in Milwaukee, Wisconsin. The litigation surrounding Dr. Kennan was first to follow the *Babbitz* decision.[1]

Initially the District Attorney of Dane County, Mr. Nichol, commenced a criminal action against Dr. Kennan. That action was thwarted by the United States District Court for the Western District of Wisconsin and subsequently by a three-judge court sitting there. *Kennan* v. *Nichol*, 326 F.Supp. 613 (1971) *aff'd.*, 404 U.S. 1055 (1971). However, the authorities of Wisconsin were not persuaded to abate their conduct as a result of the decision in the

[1] The complaint and amended complaint incorporated by reference the entire files of *Larkin* v. *McCann, et al.*, 71-C-671 and *Kennan* v. *Warren, et al.*, 71-C-132, A. 9, 10, 20, 21, ¶¶ 14, 22.

Madison case. The Attorney General in concert with these appellants, commenced an action against Dr. Kennan which threatened his license to practice medicine. Again, the federal court in Madison, Wisconsin restrained those activities. See *Kennan* v. *Warren*, 328 F.Supp. 525 (1971). Finally, a circuit court judge in Dane County proceeded on his own to attempt to stop Dr. Kennan and that judge had to be restrained by Judge Doyle. *Ibid.*

The history of the litigation in Milwaukee with respect to Dr. Larkin is similar. However, most of his cases are not reported. In December of 1971, Judge Myron L. Gordon entered a restraining order preventing enforcement of the Wisconsin abortion statute against Dr. Larkin. *Larkin* v. *McCann, et al.*, No. 71-C-671 (E.D. Wis.). While the motion for a preliminary injunction was pending, the Attorney General of Wisconsin commenced an action in Madison, Wisconsin against Dr. Larkin for declaratory relief and obtained abatement of the federal court proceedings pursuant to 28 U.S.C. § 2284(5). The litigation continued there until the entry of Mary Carpenter Bruce. Mrs. Bruce commenced an action in the Circuit Court of Milwaukee, Wisconsin against Dr. Larkin to abate a public nuisance. During the course of those proceedings, which were removed to federal court and then remanded back to the state court,[2] Mrs. Bruce was successful in obtaining a restraining order from a Circuit Court judge. Dr. Larkin commenced an action in the federal court against this Circuit judge and, during the pendency of that action, the Circuit judge withdrew his restraining order. Dr. Larkin also commenced an action in the federal court against Mary Carpenter Bruce, and

[2] *State ex rel. Bruce* v. *Larkin*, 346 F. Supp. 1065 (E.D. Wis. 1972).



Judge Myron Gordon held that that case stated a cause of action. See *Larkin* v. *Bruce*, 352 F.Supp. 1076 (E.D. Wis. 1972). Thus, in both Madison and Milwaukee, the two abortion clinics were hounded by the Attorney General, the local District Attorney, and a local state Circuit Court judge. At the time of the abortion decisions of the United States Supreme Court,[3] the only group who had not participated in Milwaukee who had participated in Madison was the State Medical Examining Board, the appellants in this case. They went after Dr. Larkin after the abortion decisions of the United States Supreme Court.

On June 20, 1973, the appellant, Thomas W. Tormey, Jr., M.D., acting on behalf of all of the other appellants, executed a Notice of Investigative Hearing which stated that the Board would "determine whether [Dr. Larkin] has engaged in practices that are inimical to the public health, whether he has engaged in conduct unbecoming a person licensed to practice medicine, and whether he has engaged in conduct detrimental to the best interests of the public." The Notice stated further:

> "Based on the evidence adduced at said investigative hearing the Medical Examining Board will determine whether to warn or reprimand if it finds such practice and whether to institute criminal action or action to revoke license if probable cause therefor exists under criminal or revocation statutes."

[3] *Doe* v. *Bolton*, 410 U.S. 179 (1973); *Roe* v. *Wade*, 410 U.S. 113 (1973).

Service was attempted upon the appellee.[4] Shortly after receiving a copy of the Notice, Dr. Larkin commenced this action in the United States District Court for the Eastern District of Wisconsin. A Motion for a Temporary Restraining Order was filed (A. 16) and this investigative hearing commenced on July 12, 1973. On that same date, Dr. Larkin filed an Amended Complaint (A. 18-24). In the Second Cause of Action, Dr. Larkin challenged the constitutional validity of the Wisconsin statutory scheme in Paragraphs 2 and 3 as follows:

> "2. The proceedings of the Medical Examining Board as instituted against the plaintiff and as authorized by Chapter 448, Wis. Stats., a copy of which is attached hereto as Exhibit D, are unconstitutional and in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution in that:
>
> (a) The phrases 'inimical to the public health', 'conduct unbecoming a person licensed to practice medicine' and 'conduct detrimental to the best interests of the public' are vague, overly broad and cause men of reasonable intelligence to guess as to their meaning and effect thereby

[4] Dr. Larkin has never been served with any documents by personal service. Sec. 227.08, Wis. Stats. authorizes agencies to adopt rules for the service of notices and for the conduct of all of its hearings. The Medical Examining Board has never promulgated any rules whatsoever to govern the proceedings involved in this case. Thus, there is no provision within the regulatory agency involved for substituted service of any nature. Paragraph 2(c) of the Second Cause of Action of the Amended Complaint alleges the constitutional deprivation due to the fact that the Board does not have any rules. A. 22.



> depriving the plaintiff of notice of prohibited practices as well as providing the defendants with authority to investigate and warn, reprimand or institute criminal actions for activities of the plaintiff which are protected by the Constitution of the United States of America.
>
> (b) The Notice of Investigative Hearing, Exhibit B, states that at the conclusion of the hearing the Board will determine whether to warn or reprimand the plaintiff or whether the Board will institute criminal actions or actions to revoke license if they conclude that probable cause exists and, said notice prohibits the plaintiff and his attorney from cross examining any of the witnesses against him and from in any way appearing in these hearings in a meaningful fashion thereby subjecting the plaintiff to punishment and official condemnation without being afforded his right to be confronted by the witnesses against him, without being afforded his right to notice of the nature of the charges against him, without being afforded the opportunity to produce witnesses on his behalf, without being afforded the compulsory process for witnesses, and without being afforded a trial by jury or by persons other than his accusers, all in violation of rights guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.
>
> (c) The Medical Examining Board of the State of Wisconsin has not promulgated any rules with respect to the conduct of these proceedings. Thus, the proceedings will be regulated on an *ad hoc* basis in violation of due process of law because there are no rules to determine what process is due the plaintiff.

(d) The Notice of Investigative Hearing states that a criminal action will be brought against the plaintiff if the Board finds probable cause under the criminal statutes of the State of Wisconsin. This proceeding denies to the plaintiff the right to have a determination of probable cause made by an impartial, neutral, independent and detached judicial officer or by a grand jury, in violation of rights guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

3. These proceedings as embodied in the Notice of Investigative Hearing are brought pursuant to authority which appears in Sec. 448.17 and *448.18*, Wis. Stats. These statutes authorize the Board to warn, reprimand, determine probable cause, *suspend a license*, and *temporarily suspend a license* and, such statutory scheme is in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution as more particularly set forth in the preceding paragraph." (Emphasis supplied). A. 21-23).

The Amended Complaint in its request for relief at ¶5 asked for a Temporary Restraining Order and a Preliminary Injunction in the case. (A. 24).

At the time of the filing of the Amended Complaint, the appellants were only investigating the appellee and, on each and every occasion where they had an opportunity to do so, they assured the United States District Court for the Eastern District of Wisconsin that any effort to remove the license of Dr. Larkin, either permanently or temporarily, would only be done in a judicial proceeding and would not be done by these appellants. The counsel for the appellants repeatedly compared the activities of the appellants to a grand jury. Appellants' Memorandum



Brief in Support of Motion to Dismiss, 7/11/73, Document No. 7, p. 3; Memorandum Brief in Support of Amended Motion to Dismiss, 7/27/73, Document No. 38, p. 9; Reply Brief in Support of Amended Motion to Dismiss, 8/13/73, Document No. 41, pp. 1-3.

At Page 1 of the appellants' Reply Brief in support of their Amended Motions to Dismiss, the appellants stated the following:

> "The Medical Examining Board is not authorized to indict, but must go to the District Attorney to seek prosecution or action to revoke *or suspend* the license of one of its licensees." (Emphasis supplied). (Document 41).[5]

At Page 3 of the same brief, the appellants made the following statement to the federal court:

> "The obvious distinction is that in the present case the Medical Examining Board is conducting an investigative hearing and not a contested hearing. *Any contested hearing will be held before a court and/or jury.*" (Emphasis supplied). (Document 41).

At Pages 5 and 6 of that same brief, the appellants stated that any revocation proceeding would be "steeped in due process provisions." *Ibid.*

In that posture and with those assurances regarding the procedure being employed against Dr. Larkin, the United States District Court for the Eastern District of Wisconsin repeatedly denied requests for preliminary injunctive relief.

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[5] These documents were not printed in the Appendix in violation of the court rules, even though reproduction was demanded by the appellee. The appellee believes that a full examination of the representations made to the trial court by counsel for the appellants is necessary to appreciate the situation presented by the appellants to the trial court. Counsel for the appellants below also serves officially as counsel to the appellants in their day to day business.

The proceedings against Dr. Larkin with respect to the so-called investigative hearing were held on July 12 and 13, 1973, and were continued on October 4, 1973. Between July 13, 1973 and October 4, 1973, and, on September 18, 1973, the appellants, acting pursuant to Sec. 448.18 (7), Wis. Stats., completely changed their posture and issued a Notice of Contested Hearing against Dr. Larkin. (A. 45-46). The Board scheduled the contested hearing for the afternoon of October 4, 1973. Thus, the contested hearing was directed to take place at the conclusion of the investigative hearing. The issues involved in the contested hearing were identical to the issues which had been investigated by the Board. They were connected with:

1. Whether Dr. Larkin practiced medicine under a different name than the one which appears on his license;
2. Whether Dr. Larkin allowed an unlicensed physician to practice medicine at his clinic; and
3. Whether Dr. Larkin split fees with other persons.[6]

On September 20, 1973, the appellee filed a copy of the Notice of Contested Hearing with the United States District Court with an accompanying letter. In that letter, the appellee stated the following:

> "The present posture of the proceedings is a classic example of violations of due process of law. The so-called investigation was conducted by the defendants. Before that investigation is completed, the same defendants bring charges against the plaintiff and are his accusers. The judge and jury of the charges are the same people who preferred them. At the conclusion of the hearing, his accusers and judges will then pass sentence upon him. Thus, the procedure violates most known tenets of due process of law. (Citing cases).
>
> "We now ask the court for an immediate restraining order to prevent irreparable harm which is being threatened against Dr. Larkin in violation of the constitution of the United States." (Document No. 44).[7]

[6] This Notice of Contested Hearing was served in the same improper manner as the original Notice.



On September 26, 1973, the appellee filed another Motion for Temporary Restraining Order and Interlocutory Injunction. (A. 46-47). That Motion focused upon the contested hearing which was scheduled to commence on October 4, 1973 and incorporated as grounds the positions "more fully set forth in the affidavits and briefs previously filed herein." The letter accompanying the Motion to Judge Gordon, a copy of which was sent to counsel for the appellants, stated the following:

> "Enclosed is a Motion for Temporary Restraining Order and Interlocutory Injunction which specifically focuses upon the latest maneuver by the defendants whereby they are attempting to suspend Dr. Larkin's license pursuant to the provisions of Sec. 448.18(7), Wis. Stats. The Amended Complaint in the case generally challenged the validity of Sec. 448.18, and Paragraph 2(b) in conjunction with Paragraph 3 of the Second Cause of Action specifically challenged the constitutionality of the Board to invoke Sec. 448.18(7) to temporarily suspend the license without being afforded a trial by jury or by persons other than his accusers, *inter alia.*" (Document No. 45).

[7] This document was not printed in the appendix although a request for printing was made. See FN 5, *supra.*

In a decision dated October 1, 1973, the Honorable Myron L. Gordon ordered the entry of a Temporary Restraining Order. (A. 47-53). The court detailed the history of the proceedings and noted that the action by the Board in pursuing a contested hearing changed the proceedings "radically". The court summed up the situation which it was facing as follows:

> "The plaintiff, a licensed physician who performs abortions in this state, brought this action against the members of the state medical examining board for injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343.
>
> "The complaint alleged that an investigative hearing had been initiated concerning Dr. Larkin, but that the notice thereof failed to disclose any specific allegations of misconduct. It was further alleged, upon information and belief, that the investigation was launched in order to punish the plaintiff for performing abortions.
>
> "A motion for a temporary restraining order, filed with the complaint, was denied. I concluded that the plaintiff's complaint was insufficient to justify interference with the examining board's attempt to perform its statutory investigative duty. The plaintiff was given the opportunity, however, to submit memoranda with respect to his motion for a preliminary injunction.
>
> "Following a motion to dismiss filed by the defendants, the plaintiff amended his complaint to challenge the constitutionality of the statutes authorizing the examining board to act. A request to convene a three-judge court and a motion for a temporary restraining order or preliminary injunction were also filed. The defendants amended their motion to dismiss so as to make it applicable to the amended complaint.



> "The plaintiff's motion for a temporary restraining order was again denied. Although I believed then, as I do now, that there is a serious question as to the validity of legislation which allows an examining board both to rule on *and* to punish for charges evolving from its own investigation, that question was not presented at that time. The challenge was only to the activity then being engaged in by the board, which was investigation.
>
> "Again, however, the plaintiff was given the opportunity to submit authorities in support of his position, and the defendants were allowed to brief the motion to dismiss. It was anticipated that the arguments presented by the parties would also be helpful toward resolving the question of whether a three-judge court was required.
>
> "Since that time, the status of this action has changed radically. The board is no longer engaged in an investigative proceeding, for it has notified the plaintiff that it has scheduled a 'contested hearing' at which it will determine whether his license should be temporarily suspended. The board's current action makes all allegations of the plaintiff's amended complaint germane. The positions of the parties can no longer be assessed in terms of a limited challenge involving only investigative proceedings; the board's present action calls into play all challenges to the statutory scheme as detailed in the plaintiff's complaint." *Larkin* v. *Withrow*, 368 F.Supp. 793, 794 (E.D. Wis. 1973). (A. 48-49).

The appellants, in response to this order of Judge Gordon, did not proceed with their contested hearing. However, the appellants proposed to continue with their investigative hearing on October 4, 1973. On October 3, 1973, the appellee attempted to obtain a Temporary Restraining Order against the continuation of the investigative hearing. (A. 53). This motion was denied by Judge

Gordon. See docket entry in connection with Document No. 21. Thus, even though the contested hearing had been suspended, the appellants chose to continue their investigative hearing on October 4, 1973. They concluded that hearing on that date, and on October 5, 1973, the appellants issued Findings of Fact and Conclusions of Law. Those findings and conclusions resolve every issue presented in the Notice of Contested Hearing against the appellee, Dr. Larkin. (A. 56-60).

The Board in its Findings of Fact concluded that Dr. Larkin practiced medicine under a different name than the one which appears on his license. Findings (3), A. 57. The Board concluded that Dr. Larkin allowed an unlicensed physician to practice medicine at his clinic. Findings (4) (b), (c) and (6), (A. 57, 58.) The Board also found that Dr. Larkin split fees with other persons. Findings (7), A. 58. The Board went on to make conclusions of law that Dr. Larkin in practicing medicine under a different name, in allowing an unlicensed physician to practice medicine and in splitting fees with other persons had engaged in conduct detrimental to the best interests of the public and conduct unbecoming a person licensed to practice medicine, and thereby concluded that there was probable cause for an action to revoke the license of Dr. Larkin and probable cause for criminal proceedings. The matter was referred to the District Attorney of Milwaukee County for further action.

Subsequently, on November 9, 1973 the three-judge court met and announced from the bench that the Motion for a Preliminary Injunction would be granted. In lieu of Findings of Fact and Conclusions of Law, the three-judge court issued a written decision dated December 21, 1973. *Larkin v. Withrow*, 368 F.Supp. 796 (E.D. Wis. 1973). A. to Juris. Statement, 2-4. In that decision, the three-judge court stated that the loss to a physician of his right to practice medicine constitutes a loss of his liberty or property. Furthermore, such a person is entitled to procedural due process because of the "significant interference with his property rights or his liberty." *Id.* at p. 797. The court stated:



> "In our view, the interference with a physician's ability to practice his profession qualifies as an interference with a property right. It is certainly 'a sufficient threat of personal detriment.' Doe v. Bolton, 410 U.S. 179, 188 (1973)." *Ibid.*

The court went on to state that the suspension of a license to practice medicine "presumptively has a serious adverse affect on the physician's reputation. Thus, it is clear that the plaintiff's liberty is also at stake." *Ibid.* In that language, the court demonstrated its position that there would be irrevocable injury to the appellee. The court noted that there was no exhaustion available in the state courts in the following language:

> "It is true that any action taken by the board pursuant to Sec. 448.18(7) is subject to judicial review under Sec. 227, Wis. Stats. (1971). However, that review statute goes only to the propriety of the board's *exercise* of statutory authority. We found that the very statutory authority *empowering* the board to act in the first instance was itself unconstitutional." (Emphasis, the court's). *Id.* at p. 798.

The appellants appeal the entry of this interlocutory judgment to the United States Supreme Court.

Subsequent to the appeal and on July 5, 1974 the appellants filed a motion to modify the injunction. Document S-1. In the affidavit accompanying the motion, a member of the Board and one of the appellants, Dr. John W. Rupel.

stated that the Board has modified its procedures in accordance with the decision in this case whereby one member of the Board engages in the investigative aspects of a case and presents his conclusions to the remainder of the Board for review. Thus, the Board has ostensibly separated its investigative and adjudicative functions. Dr. Rupel also stated that the Board wished to suspend three persons rather than seek revocation because those three persons were either addicted to drugs or alcoholics and their diseases severely affected their ability to practice medicine. As part of the rehabilitation program, it was the desire of the Board to merely suspend the licenses rather than seek revocation so that the persons involved would have an opportunity to readjust their lives to the point where they would no longer threaten the health care provided to the community.[8] In response to a cross motion by the appellee to modify the injunction, Document No. S-2, the trial court on July 25, 1974 modified the judgment to read as follows:

> "It is ordered and adjudged that the preliminary injunction and judgment dated January 31, 1974, be and hereby is modified, pursuant to Rule 62(c), Federal Rules of Civil Procedure, so that said judgment reads as follows:

[8] None of the charges leveled against Dr. Larkin at any time questioned his ability to practice medicine, his competency, or the quality of medical services provided at his clinic. Throughout the investigative hearings, Dr. Larkin complained about the notoriety of his case during the "secret" proceedings. See affidavits in support of motions for temporary restraining orders and preliminary injunctions. A. 15, 26-29, 38-43. The names of the drug addicted and alcoholic doctors who present threats to the health care of the community, according to the affidavit of Dr. Rupel, have not been released publicly during the course of those investigations.



> IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success." Document No. S-5.

On July 26, 1974, the appellee mailed a suggestion of mootness or in the alternative motion to reconsider appellee's motion to dismiss or affirm. This suggestion and motion were pending when this brief was written.

## ARGUMENT

**DUE PROCESS OF LAW IS VIOLATED WHEN THE SAME PERSONS WITHIN AN ADMINISTRATIVE AGENCY PROPOSE TO BE THE JUDGES OF CHARGES WHICH THEY HAVE PREFERRED AFTER AN EXTENSIVE INVESTIGATION, SIMILAR TO AN INVESTIGATION MADE BY A GRAND JURY, AND AFTER THEY HAVE UNANIMOUSLY CONCLUDED THAT PROBABLE CAUSE EXISTS FOR PROSECUTION OF THE PERSON UNDER INVESTIGATION AND HAVE UNANIMOUSLY CONCLUDED EACH AND EVERY ISSUE TO THE POINT WHERE THEY HAVE MADE FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT HIS LICENSE SHOULD BE REVOKED.**

This case involves the procedural due process which must be provided to a doctor licensed to practice medicine. Succinctly stated, the issue is whether procedural due process is violated when the same persons who investigated and brought charges against a doctor can be the judges of those charges for purposes of suspending a doctor's license for six months.[9]

[9] This case is not concerned with the mixing of functions within the same administrative agency. As the court well knows, most agencies have segregated functions for investigation, prosecution and adjudication. Within those functions, some agencies have some minor mixing of functions. The appellants' brief at 22-43, attempts to confuse this case with such a factual situation. However, the Wisconsin Medical Examining Board had no segregation of functions. The very same persons who investigated and accused Dr. Larkin were prepared to judge him until enjoined by the District Court.



This case presents more than some minor mixing of accusatorial and adjudicatorial functions by persons within an administrative agency. This case presents a factual situation where the Board conducted a full and complete investigation and had concluded in an *ex parte* hearing that Dr. Larkin had violated the law and that his license to practice medicine should be revoked. Then, these same Board members proposed to be the judge of their own accusation in a so-called contested hearing. There is no support in the settled law of the United States for such bias on the part of administrative boards.[10]

The operative facts which were relied upon by the District Court are uncontested. They are as follows:

1. The appellants investigated Dr. Larkin in an *ex parte* hearing; (A. 13-14, 20, 26-29, 35-37, 60)
2. At the conclusion of this investigative hearing, the appellants made Findings of Fact and Conclusions of Law which resolved the factual issues in the case; (A. 56-60)
3. The appellants in those Findings of Fact and Conclusions of Law transmitted to the District Attorney of Milwaukee County, Wisconsin a recommendation and finding of probable cause that criminal and civil forfeiture of license proceedings be commenced against Dr. Larkin; (A. 56-60)

[10] The reliance of the appellants on *Richardson* v. *Perales*, 402 U.S. 389 (1971) in their brief at 27 is misplaced. In *Perales*, the hearing examiner was not an accuser. Although he had some investigative functions, the end product was not an accusation or exoneration. His role was to determine facts of injury in a social security context and he was empowered to obtain independent medical examinations similar to a court obtaining independent medical testimony in an insanity case.

4. The appellants proposed by a Notice of Contested Hearing to try Dr. Larkin upon charges which were identical to the findings which had previously been made and, at the conclusion of that so-called contested hearing to decide whether to suspend Dr. Larkin's license to practice medicine for a period of up to six months; (A. 45-46; Sec. 448.18 (7), Wis. Stats.)

5. The Statutory scheme of the State of Wisconsin contained in Chapter 448 authorizes such proceedings;

6. None of the charges brought against Dr. Larkin at any time challenged his qualifications as a physician to practice medicine in the State of Wisconsin and none of the allegations against him even remotely suggests that he is incompetent to practice medicine in the State of Wisconsin or that his clinic has in any way injured any citizen of the State of Wisconsin due to lack of proper medical treatment. (A. 45-46, 56-60)

The issue is whether the trial court abused its discretion in entering a preliminary injunction when faced with this factual situation.

There is no doubt that a person whose medical license is about to be suspended or revoked is entitled to due process of law.[11] A citizen of the United States has a vested right to pursue the common occupations of life and this right can be protected by a federal civil rights proceeding. *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) and *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972). Suspension or revocation of a right to practice a profession is comparable to a criminal proceeding. *In Re Ruffalo*, 390 U.S. 544, 550-

[11] The brief of the appellants concedes that due process of law must be afforded to the appellee. A. brief 22-43.



551 (1968). Thus, the due process rights which attach to such a proceeding must be given careful scrutiny.[12]

In this case, the due process right which was about to be denied to Dr. Larkin was his right to be judged by an unbiased decision maker. The appellants here were biased as a matter of law because they had extensively investigated Dr. Larkin and had become his accusers prior to the entry of the preliminary injunction in this case. When Dr. Larkin was attempting to restrain the investigation being conducted by this Board, counsel for the Board repeatedly compared the work of the Board as being similar to a grand jury investigation. At the conclusion of this investigation, the grand jurors proposed to become the judges of their charges for purposes of suspending Dr. Larkin's license to practice medicine for a period of up to six months. It was at that stage that the trial court properly stepped in and halted these suspension proceedings. In *In Re Murchison*, 349 U.S. 133 (1955), this Court observed that no state has ever forced a defendant to accept grand jurors as his trial jurors. In unmistakably clear language, this court stated the fundamental due process right as follows:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on

[12] The appellants in their brief at 39 suggest that the right to practice medicine is a privilege and that, therefore, less due process can attach to revocation proceedings. However, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege' ". *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971). See also *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

> charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatorial process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Id.* at 137.

See also *Offutt* v. *United States,* 348 U.S. 11 (1954) and *Bloom* v. *Illinois,* 391 U.S. 194, 202 (1968). This elemental due process admonition which is applicable to judges and juries is equally applicable to administrative agencies which try to revoke and suspend the license of a doctor to practice medicine.

This court has not retreated from the admonition of *Murchison.* In *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), this Court overturned the dismissal of a school teacher who had made critical remarks against his Board of Education. It was that same Board of Education which tried this teacher. The issue regarding mixing of functions was raised for the first time on appeal. This Court commented on that issue in the following manner:

> "Appellant requests us to reverse the state courts' decisions upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this Court, not having raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case.



> *On the other hand, we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning vis-a-vis appellant.* Compare Tumey v. Ohio, 273 U.S. 510 (1927); In Re Murchison, 349 U.S. 133 (1955). Accordingly, since the state courts have at no time given de novo consideration to the statements in the letter, we feel free to examine the evidence in this case completely independently and to afford little weight to the factual determinations made by the Board." 391 U.S. at 578. (Emphasis supplied).

Indeed, the United States Court of Appeals for the Second Circuit in a case involving the expulsion of a cadet from the Merchant Marines Academy stated the obvious proposition of law as follows:

> "It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that prior official involvement renders impartiality most difficult to maintain." *Wasson* v. *Trowbridge,* 382 F.2d 807, 813 (2nd Cir. 1967).

In revocation of parole or probation, one of the minimum protections of due process of law found by this Court is "an independent decision maker." The decision on the merits of the allegations against a parolee or a probationer as well as the decision on the punishment to be imposed must be made by someone other than the person who brings the charges. *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) and *Gagnon* v. *Scarpelli,* 411 U.S. 778, 786 (1973).

The appellants argue that Dr. Larkin could have easily obtained a *post hoc* fair hearing before an independent decision maker. Appellants' brief at 34. However, the three-judge court pointed out that there was no effective administrative remedy available because the appeal only determines the propriety of the exercise of the statutory authority of the Board. In this case, the court concluded that

the Board itself was improperly constituted. Thus, the appeal is meaningless because the reviewing court would only determine whether there was sufficient evidence to support the findings of the Board, were they allowed to proceed. *Hilboldt* v. *Wis. R. E. Brokers' Bd.*, 28 Wis.2d 474, 482, 137 N.W.2d 482 (1965). The nature of the challenge here is that the Board was biased, and that their findings could not be anything more than a reflection of their bias.[13] This Court stated in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973):

> "In the instant case the matter of exhaustion of administrative remedies need not detain us long. Nor-

[13] Although the merits of the charges against Dr. Larkin are not at issue at this time, the fact of the matter is that Dr. Larkin has legal and factual defenses to the charges. Section 448.02 (4), Wis. Stats. does not prohibit practicing under a false name. That statute prohibits practicing under a false name after the Board makes a finding, after a hearing "that practicing under such changed name operates to unfairly compete with another practitioner or to mislead the public as to identity or to otherwise result in detriment to the profession or the public." The statutory history shows that the Statutes of Wisconsin originally enacted an absolute prohibition against doctors using assumed names. That absolute prohibition was modified by the language quoted above. See History of Sec. 448.02 in Wis. Stats. Annot.

There is no statute prohibiting soliciting patients by means of agents. Indeed, Sec. 448.18 (1)(b) prohibits advertising with respect to venereal diseases and lost manhood or womanhood. No other prohibition against advertising has been found in Chapter 448. Presumably, other forms of advertising are not prohibited in Wisconsin.

Although Sec. 448.02 (1) prohibits the practice of medicine without a license, that statute contains exceptions. Section 448.16, Wis. Stats. states that medical physicians of other states or countries in consultation with resident licensed practitioners do not have to be



> mally when a state has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is con-

(Footnote continued)

licensed by the State of Wisconsin. See 1927 Op. of the A.G. of Wisconsin 702, where the Attorney General held that an Illinois physician was not required to obtain a Wisconsin license to practice medicine in Wisconsin in the office of a doctor who was licensed in Wisconsin. Dr. Young Whan Ahn was licensed to practice medicine in the State of Georgia in the fall of 1972, and, upon information and belief was licensed to practice medicine at all times pertinent in the Republic of South Korea. Also, a license is not required for treatment rendered in an emergency. "Emergency" has not been defined by cases in Wisconsin. It is a matter of public record that the Medical Examining Board, in conjunction with the Attorney General and the District Attorney of Milwaukee County threatened the medical profession with punishment if any engaged in the practice of administering abortions in violation of Sec. 940.04, Wis. Stats. They were so successful in their intimidation that only Dr. Kennan and Larkin regularly performed abortions in their clinics under protection of the federal courts. Thus, women in need of medical treatment and entitled under the law of medical treatment were turned away by most doctors because of the public threats of these public officials. These same public officials here sought to investigate Dr. Larkin to pass judgment upon his response to the medical emergency which they illegally created.

The so-called fee splitting section, Sec. 448.23 (1), Wis. Stats. is very limited in scope. The statute compels physicians to render an individual statement for his charges even though the physician is working for some institution or organization. The statute does not prohibit a doctor from paying another person money for any reason whatsoever.

The appellants have disqualified themselves from resolving these factual controversies because they were the investigators of Dr. Larkin and, at the time of the entry of the Preliminary Injunction, they had become his formal accusers due to the entry of their Findings of Fact and Conclusions of Law.

tested and administrative expertise, discretion or fact-finding is involved. *But this court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. § 1983.*" *Id.* at p. 574. (Emphasis supplied)

and

"Here the predicate for a *Younger* v. *Harris* dismissal was lacking, for the appellees alleged, and the District Court concluded, that the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it. If the District Court's conclusion was correct in this regard, it was also correct that it need not defer to the Board. *Nor, in these circumstances would a different result be required simply because judicial review, de novo or otherwise, would be forthcoming at the conclusion of the administrative proceedings.*" (Emphasis supplied). *Id.* at 577.[14]

In addition, this Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) quoted with approval from the lower court "that due process requires an adequate hearing before termination of welfare benefits, and *the fact that there is a later constitutionally fair proceeding does not alter the result.*"

[14] In like manner, *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Samuels* v. *Mackell*, 401 U.S. 66 (1971) are not applicable because this is a civil and not a criminal proceeding and Dr. Larkin had commenced this action in the federal courts *prior to* the commencement of the contested hearing whereby the appellants sought to suspend his license to practice medicine. As pointed out in *Gibson*, there is no requirement to seek relief in a state forum when a challenge is made against the activities of a state administrative agency.



[*Kelly* v. *Wyman*, 294 F.Supp. 893, 901]. (Emphasis supplied). *Goldberg* v. *Kelly*, 397 U.S. at 261.[15]

Finally, the appellants argue in their brief at 43-50 that Dr. Larkin was not facing irreparable injury and that the record did not support such a finding by the trial court. There is nothing esoteric about the irreparable injury threat to Dr. Larkin and the facts surrounding his

[15] The court in *Goldberg* noted at footnote 10 at 397 U.S. 263 that in situations where great public harm is imminent rights may be terminated with less due process rights. We submit that with respect to a doctor licensed to practice medicine that the imminent and grave threat to the public would be only that the doctor is not competent to practice medicine and is a danger to the public at large and to his patients in particular. Such would be the case of the doctors who are either drug addicts or alcoholics as presented in the appellants' motion to modify injunction, Document No. S-1. However, Dr. Larkin has never been accused of being incompetent or that his continued practice of medicine endangered the public or his patients. The findings of fact which were made on October 5, 1973 indicate that all allegations against Dr. Larkin had ceased by that date. The alleged use of the name Glen Johnson terminated "on or about April 25, 1972," Findings of Fact, at (3), A. 57. The alleged use of other names by employees of his terminated "on or about May 25, 1973." *Id.* at (4). The alleged fee splitting terminated "on or about February 27, 1973." *Id.* at (5), A. 58. The alleged use of an unlicensed person who engaged in the practice of medicine terminated "on or about February 27, 1973." *Id.* at (6). And the alleged failure to render individual statements terminated "on or about September 30, 1973." *Id.* at (7). Thus, the proposed suspension of the license to practice medicine on October 4, 1973 is in no way related on that date to the protection of the public. In its context, the proposed suspension of the license can only be deemed to be a proposal to punish Dr. Larkin for alleged activities which do not relate to his professional competence. In this context, *Goldberg* does not contemplate the necessity for prompt, swift action with less due process protection than might be necessary were professional incompetence alleged.

irreparable injury are not in dispute. Simply stated, Dr. Larkin was being threatened with a six-month loss of his right to practice medicine in Wisconsin. As stated in the amended complaint at ¶s 3 and 14 and as admitted by the appellants in their answer (A. 18, 19, 60), Dr. Larkin was a physician and surgeon who was duly licensed to practice medicine in the State of Wisconsin and had established offices in Milwaukee, Wisconsin for the purpose of practicing medicine. Dr. Larkin in the fall of 1971 commenced engaging in the practice of medicine in Milwaukee, Wisconsin and his practice included administering abortions. It is the right to practice medicine which was threatened by the Board. If this threat were carried out, Dr. Larkin would not only have suffered irreparable loss of income, but his reputation would have suffered also. Those two conclusions were certainly appropriately made by the lower court. Indeed, this court in *Gibson* v. *Berryhill*, 411 U.S. at 477, Fn. 16 approved of the conclusion of the trial court:

> "That the revocation by the Board of the appellees' licenses to practice their profession, 'together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage to the appellees for which no adequate remedy is afforded by state law.' "[16]

This case presents a most aggravated attempt to deprive the appellee of due process of law. At the time when the three-judge court entered its preliminary injunction, the

[16] The appellants' reliance upon *Sampson* v. *Murray*, ..... U.S. ..... 39 L.Ed.2d 166 (1974) is misplaced. In *Sampson*, the court found that there was no irreparable injury because Congress had provided for back pay for any civil service employee who was improperly suspended or dismissed. 39 L.Ed.2d at 187. Obviously, Dr. Larkin would suffer irreparable economic injury were his license suspended for six months in addition to damage to his reputation.



appellants in this case had made formal Findings of Fact and Conclusions of Law which resolved every issue in the case against Dr. Larkin. This was done at the conclusion of an *ex parte* hearing. The Board, in that same decision presented the matter to the District Attorney of Milwaukee County with a finding of probable cause that Dr. Larkin had violated the criminal laws of the State of Wisconsin and that his license should be revoked on the basis of their findings of fact. After this decision was made, these appellants then proposed to conduct a so-called Contested Hearing. In that Contested Hearing, the appellants would re-review the evidence and then decide whether the charges which they had previously preferred against Dr. Larkin supported a six (6) month suspension of his license to practice medicine. Thus, the "grand jurors" would become the "petit jurors." None of the other cases which have struck down the mixing of functions in administrative agencies involved such an aggravated fact situation.[17]

[17] In addition to the cases previously cited in the brief, other cases which have struck down the mixing of investigative, prosecutorial and adjudicatorial functions as being in violation of due process of law are *American Cyanamid Company* v. *FTC*, 363 F.2d 757 (6th Cir. 1966); *Amos Treat & Co., Inc.* v. *SEC*, 306 F.2d 260 (D.C. 1962); *Mack* v. *Florida State Board of Dentistry*, 296 F.Supp. 1259 (S.D. Fla. 1969), aff. and vac'd. 430 F.2d 862 (5th Cir. 1970); *cert. den.* 401 U.S. 954 (1971); *Trans World Airlines* v. *CAB*, 254 F.2d 90 (D.C. 1958); *Texaco* v. *FTC*, 336 F.2d 754, 760 (D.C. 1964) and *Glass* v. *Mackie*, 370 Mich. 482, 122 N.W.2d 651 (1963).

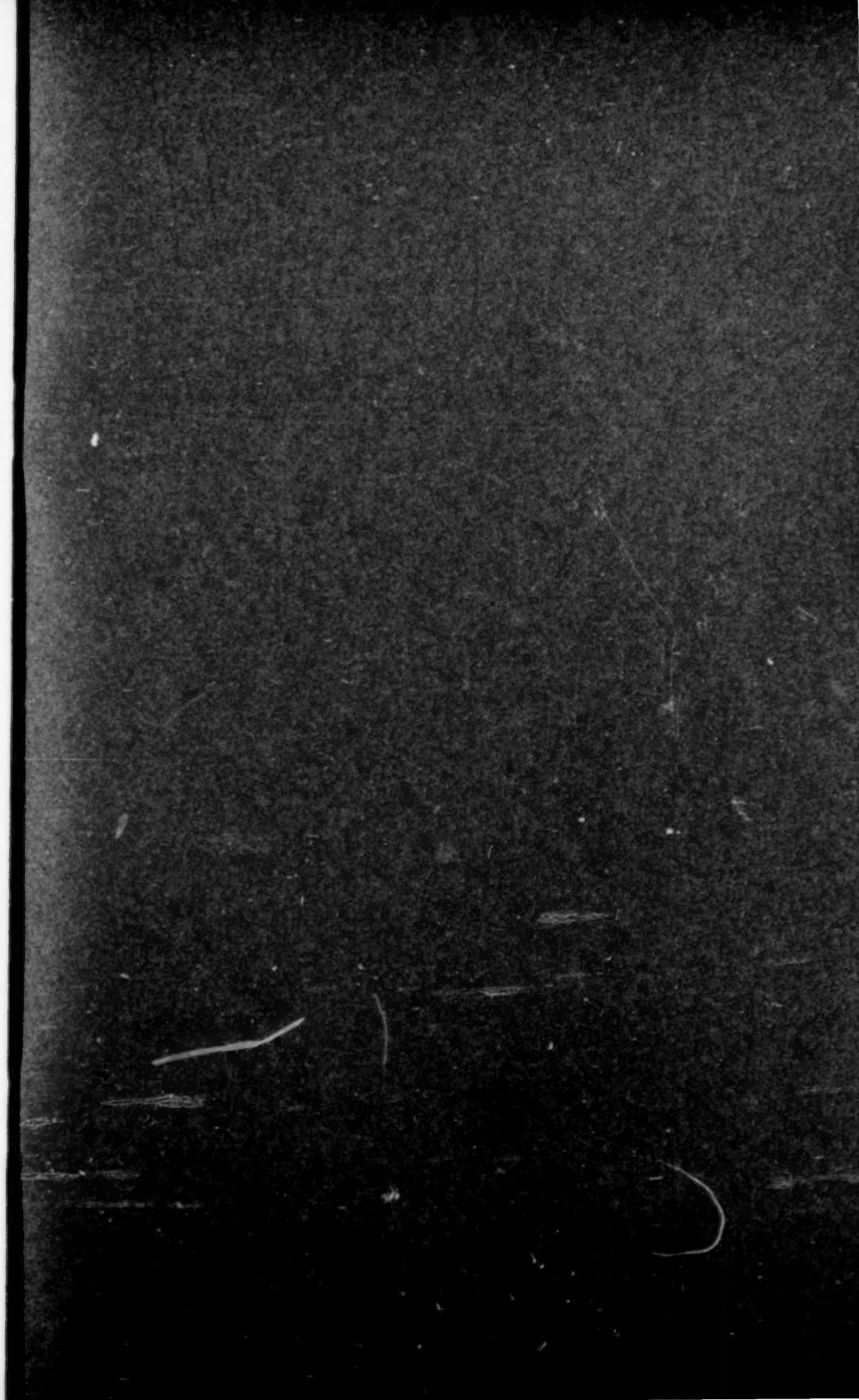
## CONCLUSION

On the basis of the foregoing, it is respectfully requested that the Court affirm the judgment of the three-judge district court in this case granting a preliminary injunction.

Respectfully submitted,

ROBERT H. FRIEBERT
*Attorney for Appellee*

*Of Counsel:*
SAMSON, FRIEBERT, FINERTY & BURNS
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130



No. 73-1573

# In the Supreme Court of the United States

OCTOBER TERM, 1973

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A.J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin,

*Appellants,*

vs.

DUANE LARKIN, M.D.,

*Appellee.*

On Appeal from the United States District Court for the Eastern District of Wisconsin.

## SUGGESTION OF MOOTNESS OR IN THE ALTERNATIVE MOTION TO RECONSIDER APPELLEE'S MOTION TO DISMISS OR AFFIRM

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## TABLE OF CONTENTS


PAGE

Notice of Motion to Modify Injunction dated July 3, 1974 ..... 3

Motion to Modify Injunction dated July 3, 1974 ..... 4

Affidavit in Support of Motion to Modify Injunction dated July 2, 1974 ..... 6

Brief in Support of Motion to Modify Injunction ..... 10

Motion to Modify Injunction dated July 5, 1974 ..... 14

Brief in Support of Motion to Modify Injunction ..... 15

Reply Brief in Support of Motion to Modify Injunction dated July 10, 1974 ..... 17

Order of Court dated July 24, 1974 ..... 19

Modified Judgment of the Court dated July 25, 1974 .... 21

# In the
# Supreme Court of the United States

October Term, 1973

## No. 73-1573

**HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A.J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin,**

*Appellants,*

vs.

**DUANE LARKIN, M.D.,**

*Appellee.*

On Appeal from the United States District Court for the Eastern District of Wisconsin.

## SUGGESTION OF MOOTNESS OR IN THE ALTERNATIVE MOTION TO RECONSIDER APPELLEE'S MOTION TO DISMISS OR AFFIRM

The appellee, Dr. Duane Larkin, by his attorney, Robert H. Friebert, hereby suggests to the Court that the appeal in the above captioned case is moot, or, in the alternative, the appellee moves for reconsideration of his Motion to Dismiss or Affirm. Said motion is based upon the fact that the District Court on July 24, 1974, initially in response to a motion of the appellants and ultimately in re-

sponse to a cross motion by the appellee modified their judgment to state the following:

> "IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18(7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success."

In support of this suggestion of mootness and motion, the appellee submits the following documents:

1. The defendants' Notice of Motion to Modify Injunction dated July 3, 1974;
2. The defendants' Motion to Modify Injunction dated July 3, 1974;
3. The affidavit on behalf of the defendants in support of the Motion to Modify Injunction dated July 2, 1974;
4. The Brief of the defendants in support of Motion to Modify Injunction;
5. The plaintiff's Motion to Modify Injunction dated July 5, 1974;
6. The plaintiff's Brief in Support of Motion to Modify Injunction;
7. The defendants' Reply Brief in Support of Motion to Modify Injunction dated July 10, 1974;
8. The Order of the Court dated July 24, 1974;
9. The Modified Judgment of the Court dated July 25, 1974.

Dated at Milwaukee, Wisconsin this 26th day of July, 1974.

P.O. Address:
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130

*/s/ Robert H. Friebert*
Robert H. Friebert



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

*Plaintiff,*

*vs.*

HAROLD WITHROW, D.O., et al.,

*Defendants.*

**NOTICE OF MOTION**

TO: Robert H. Friebert
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
Attorney for Plaintiff

PLEASE TAKE NOTICE that the defendants will bring the attached Motion to Modify Injunction on for hearing before the court in the courthouse in Milwaukee at such date and time as shall be set by the court.

Dated at Madison, Wisconsin, this 3rd day of July, 1974.

ROBERT W. WARREN
Attorney General of Wisconsin
*/s/ Le Roy L. Dalton*
Le Roy L. Dalton
Assistant Attorney General
*Attorneys for Defendants*

P.O. Address:
Room 114 East, State Capitol
Madison, Wisconsin 53702
Telephone: 608-266-3863

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

*Plaintiff,*

*vs.*

HAROLD WITHROW, D.O., et al.,

*Defendants.*

**MOTION TO MODIFY INJUNCTION**

TO: The Honorable Myron L. Gordon
United States District Judge
Federal Building
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

COME NOW the defendants, by their attorneys, Robert W. Warren, Attorney General of Wisconsin, and LeRoy L. Dalton, Assistant Attorney General of Wisconsin, and move the court under the authority of Rule 62 (c) of the Federal Rules of Civil Procedure to modify the temporary injunction entered by judgment on January 31, 1974, so that the last phrase of said judgment reads as follows:

"* * * that the defendants are preliminarily enjoined until further notice from utilizing the provisions of



§448.18 (7), Wis. Stats., against the plaintiff Duane Larkin, M.D."

Dated at Madison, Wisconsin, this 3rd day of July, 1974.

ROBERT W. WARREN
Attorney General of Wisconsin
/s/ *Le Roy L. Dalton*
Le Roy L. Dalton
Assistant Attorney General
*Attorneys for Defendants*

P.O. Address:
Room 114 East, State Capitol
Madison, Wisconsin 53702
Telephone: 608-266-3863

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

*Plaintiff,*

*vs.*

HAROLD WITHROW, D.O., et al.,

*Defendants.*

**AFFIDAVIT IN SUPPORT OF MOTION TO MODIFY INJUNCTION**

STATE OF WISCONSIN )
) SS.
COUNTY OF WOOD )

John W. Rupel, M.D., being first duly sworn, on oath deposes and says:

(1) That he is the chairman of the Medical Examining Board of the State of Wisconsin and is one of the defendants herein.

(2) That he has supervision of the business and affairs of the Medical Examining Board and is familiar with the files of said Board.

(3) That since the three-judge court gave its oral decision on November 19, 1973, the Medical Examining Board



has not used the authority of sec. 448.18 (7), Wis. Stats., for the purpose of imposing discipline upon Duane Larkin, M.D., and has not used said statute to discipline any other licensed physician because of the finding by the court and its judgment that said statutory provision is unconstitutional.

(4) That since the oral decision of the court on November 19, 1973, the Medical Examining Board has changed its investigative procedures so that each new case is assigned to one member of the Board to investigate, thereby leaving the remainder of the Board free of any involvement in the investigative process. That the Board has been advised by counsel that it is the opinion of counsel that such separation of functions would permit the remainder of the Board to consider any adjudicatory questions involved in the case without violating the due process rights of any licensee under investigation.

That, however, becauseof the preliminary injunction set out in the judgment enjoining the Board from utilizing the provisions of sec. 448.18 (7), Wis. Stats., the Board has been deprived of a valuable tool in carrying out its supervisory functions in connection with persons licensed to practice medicine in the State of Wisconsin. That if said preliminary injunction applied only to Duane Larkin, M.D., the Board could use the statute in question in appropriate cases where suspension might be justified in order to protect the public interest, especially where the physician involved is having problems with drugs or alcohol, and revocation of the license by action through the office of the district attorney would not be necessary or desirable in the program of rehabilitation of the licensed physician.

(5) That there are pending at this time before the Board three cases where suspension might be appropriate

rather than the more drastic remedy of seeking revocation. In the first case, a podiatrist is apparently the victim of a drug habit and the Board feels that the most appropriate course of action would be to temporarily suspend the doctor's license, thereby cutting off the source of the drugs which he has been obtaining by writing prescriptions for himself, and thereby initiate a program of rehabilitation rather than initiating the more drastic remedy of revocation of the license by an action brought by the district attorney.

(6) That the second case that the Board presently is dealing with, where immediate suspension should be used to protect the public interest, involves alcoholism and failure to diagnose diabetes, emphysema, and arteriosclerotic heart disease. After the local medical society failed in their attempts to have the physician cooperate by receiving medical treatment, his membership in the local society was suspended and the matter referred to the Medical Examining Board. Here again, suspension and proper treatment to rehabilitate the doctor to be a useful member of the medical profession would be the preferable remedy for the Board to use in the interests of protecting the patients and potential patients of this physician rather than resorting to the difficult procedure of revocation where the Board loses its ability to help the physician to become rehabilitated.

(7) The third case presently before the Board, where suspension and rehabilitation appear to be appropriate, involves a physician who is apparently indulging in the drug habit. Again, the Board feels that suspension and rehabilitation of the physician would not only be in the public interest but would also provide an opportunity for the Board to save the professional career of the physician.



(8) This affidavit is made in support of a motion to modify the temporary injunction entered by the court so that it applies only to the plaintiff.

Dated at Marshfield, Wisconsin, this 2nd day of July, 1974.

*/s/ John W. Rupel, M.D.*
John W. Rupel, M.D.

Subscribed and sworn to before me this 2nd day of July, 1974.

*Dorothy Ann Snyder*
Notary Public,
Wood County, Wisconsin
My commission 7-31-77

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

*Plaintiff,*

*vs.*

HAROLD WITHROW, D.O., et al.,

*Defendants.*

## BRIEF IN SUPPORT OF MOTION TO MODIFY INJUNCTION

## STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief brought under the Civil Rights Act. The three-judge district court temporarily enjoined the Medical Examining Board from enforcing sec. 448.18 (7), Wis. Stats., after a hearing on November 19, 1973. Subsequently a written decision was filed on December 21, 1973, and judgment finding sec. 448.18 (7) unconstitutional and ordering "* * * that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats."

The defendants took an appeal from that temporary injunction to the United States Supreme Court and on June



10, 1974, the Supreme Court noted probable jurisdiction. The case is now being briefed and will be set for oral argument late in the year with a decision expected by early 1975.

In the meantime, the Medical Examining Board continues to be enjoined from utilizing the provisions of sec. 448.18 (7), Wis. Stats.

## STATUTORY PROVISIONS

Federal Rule of Civil Procedure 62 (c):

> "Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

## ARGUMENT

### I. Court Should Modify Preliminary Injunction.

In its decision and also in the judgment the court has held sec. 448.18 (7), Wis. Stats., unconstitutional and has in the judgment prohibited the defendants from further use of the provisions of sec. 448.18 (7), Wis. Stats. Thus, the Medical Examining Board has been thwarted in the use of the above statute in cases where its use could be of considerable value in protecting the interests of the people of the State of Wisconsin who receive medical services from

licensed physicians and at the same time allow the Board to use the suspension device for rehabilitation of licensed physicians who have stepped out of line.

The affidavit of Dr. John W. Rupel attached to the motion indicates that the Medical Examining Board is operating under procedures at this time which do not result in the mixing of investigative and adjudicative functions in the same person or persons. It is possible, therefore, to use the suspension statute without violating procedural due process of a licensee. The *Larkin* case was, of course, on its facts unique in that the Board investigated charges and then proposed to hold a contested hearing on those charges. Under their present operating procedure the person who supervised the investigation would not be a part of the adjudicative decision and therefore the most important shortcoming cited in the *Larkin* case would not be present.

## II. The Court Should Not Have Declared The Statute Unconstitutional.

A three-judge court on a mere motion for a preliminary injunction lacks authority to declare a state statute unconstitutional. The United States Supreme Court unanimously so held in *Mayo* v. *Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774. In reversing the judgment therein, the court, after pointing out that the lower court had declared a state statute unconstitutional, wrote (309 U.S. at 316):

> "We think the court committed serious error in thus dealing with the case upon motion for temporary injunction. The question before it was not whether the act was constitutional or unconstitutional; was not whether the Commission had complied with the requirements of the act, if valid, but was whether the showing made raised serious questions, under the Federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants."



It is obvious that the judgment in connection with the preliminary injunction should relate solely to the plaintiff Larkin and that the declaration of unconstitutionality of the statute involved was premature and should now be corrected.

## III. Preliminary Injunction Should Be Stayed As To All But Plaintiff.

The defendants have no objection that the preliminary injunction stays in effect as to Dr. Larkin. However, Dr. Rupel's affidavit clearly shows that irreparable injury is resulting to the state and its citizens by the denial of the use of sec. 448.18 (7), Wis. Stats., in appropriate cases where no mixing of functions takes place.

## CONCLUSION

It is respectfully concluded that the court should modify the judgment entered on January 31, 1974, so that the defendants are preliminarily enjoined from utilizing sec. 448.18 (7), Wis. Stats., against only the plaintiff Duane Larkin, M.D.

Respectfully submitted,

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/s/ *Le Roy L. Dalton*
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

*Plaintiff,*

*vs.*

HAROLD WITHROW, D.O., et al.,

*Defendants.*

**MOTION TO MODIFY INJUNCTION**

The plaintiff Duane Larkin, M.D. by his attorney Robert H. Friebert hereby moves the Court for the entry of an order modifying the preliminary injunction and judgment dated January 31, 1974 to state the following:

> "It is ordered and adjudged that the defendants are preliminarily enjoined until further notice from utilizing the provisions of Sec. 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer immediate and irreparable injury, loss and damage if this statute were to be applied against him in that he would be deprived of his right to practice medicine and his reputation in the community would be irreparably injured, and the defendants would not in any way be prejudiced and, further on the grounds that the plaintiff's challenge to the constitutionality of Sec. 448.18 (7), Wis. Stats. has a high likelihood of success in this case."

Dated at Milwaukee, Wisconsin this 5th day of July, 1974.

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(414) 271-0130

*/s/ Robert H. Friebert*
Robert H. Friebert



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

*Plaintiff,*

*vs.*

HAROLD WITHROW, D.O., et al.,

*Defendants.*

**BRIEF IN SUPPORT OF MOTION**

The defendants have moved to modify the injunction in the above captioned case dated January 31, 1974. The plaintiff has no objection to modifying this judgment, but believes that the changes should be more inclusive than that proposed by the defendants.

As the Court is aware, the United States Supreme Court has noted probable jurisdiction in this case. The defendants herein, claim, *inter alia,* that this Court's decision and injunction was improper because it declared the statute unconstitutional at a preliminary hearing stage and, further because this Court made no specific finding of irreparable injury. The motion to dismiss or affirm, filed by the plaintiff in the United States Supreme Court stated, *inter alia,* that these objections on their part were hypertechnical and that if the defendants felt that they were harmed they were free to petition the Court for clarification.

Now that they have so petitioned the Court, we believe that the decision of the Court ought to be amended to avoid

all of their hypertechnical objections and therefore propose the amendment as contained in the motion.

The affidavit and brief in support of the motion of the defendants is very interesting. They note that the Board has established a new procedure whereby one member investigates and the other members will decide the case. However, it is clear from these documents that the Board has already made up its mind with respect to the results of the inquiry involving those three other persons because Dr. Rupel's affidavit at Paragraphs (5), (6) and (7) indicates the decision of the Board. Furthermore, it is clear that the Board is extremely solicitous with respect to a doctor and a podiatrist who are addicted to drugs and with respect to a doctor who is an alcoholic and is unable to properly diagnose diseases. The Board in those instances is interested in rehabilitation and presumably interested in preventing notoriety as part of the rehabilitation program since it appears that it would be difficult to save these persons if their various drug habits became public information. On the other hand, the Board was not as solicitous in "rehabilitating" Dr. Larkin for the "heinous" alleged activities of using a false name, fee splitting, etc. Apparently, a nonaddicted, nonalcoholic physician who administers abortions is beyond rehabilitation.

In any event, we have no objection to amending the judgment as outlined in the plaintiff's motion. However, we do object to the partial amendment as contained in the defendants' motion.

Dated at Milwaukee, Wisconsin this 5th day of July, 1974.

*/s/ Robert H. Friebert*
Robert H. Friebert



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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No. 73-C-360

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DUANE LARKIN, M.D.,

*Plaintiff,*

*vs.*

HAROLD WITHROW, D.O., et al.,

*Defendants.*

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**REPLY BRIEF IN SUPPORT OF MOTION TO MODIFY INJUNCTION**

In response to the motion filed by the defendants requesting the court to modify the preliminary injunction and judgment dated January 31, 1974, the plaintiff has also filed a motion to modify the injunction, apparently agreeing with the proposal submitted by the defendants but in addition requesting that the modified judgment specify various grounds not previously included in the judgment.

The defendants have specified by affidavit and brief in support of motion the reasons why they are requesting the court to modify the injunction so that it applies only to the use of sec. 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D. These reasons include the fact that the Medical Examining Board has cases where it would be more appropriate to consider a suspension of the physician's license rather than to seek its permanent revocation. It is clearly set out that the Board has been hampered in its statutory duties by not being able to use sec. 448.18 (7), Wis. Stats., against licensees in appropriate circumstances.

Apparently plaintiff does not object to the modification of the injunction so as to permit the Board to use the statute in question in its overall supervision of the licensed medical profession.

The plaintiff, however, thinks this would be a good time to get rid of what are termed "hypertechnical objections" which are now present in the case pending before the United States Supreme Court. Plaintiff therefore suggests the additional language found in his motion dealing with irreparable injury to reputation and that plaintiff's challenge to the constitutionality of the statute in question has a high likelihood of success.

The plaintiff is obviously, by suggesting this addition to the judgment, attempting to obviate several issues which are presently pending in the United States Supreme Court. It is the defendants' position that these issues should be resolved in the United States Supreme Court and that this court should merely modify the injunction to permit use of the statute under appropriate circumstances.

We think, therefore, that the judgment should be modified to the extent that the Medical Examining Board is enjoined from utilizing the provisions of sec. 448.18 (7), Wis. Stats., only against Duane Larkin, M.D.

Dated at Madison, Wisconsin, this 10th day of July, 1974.

Respectfully submitted,
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 73-C-360

DUANE LARKIN, M.D.,

*Plaintiff,*

*vs.*

HAROLD WITHROW, D.O., et al.,

*Defendants.*

**ORDER**

The parties have filed motions to modify certain language in the judgment of this three-judge court dated January 31, 1974. See Rule 62(c) Federal Rules of Civil Procedure. They agree that the judgment should be modified to provide that the defendant medical examining board be enjoined from utilizing the provisions of § 448.18 (7), Wis. Stats., only against the plaintiff, Duane Larkin, M.D.

In addition, the plaintiff requests that the modified judgment should recite specific grounds not previously included in the judgment but contained in the earlier memorandum decision of this court. See *Larkin* v. *Withrow*, ..... F. Supp. ..... (E.D. Wis. No. 73-C-360, decided November 19, 1973). We conclude that the plaintiff's position is well taken. See *Schmidt* v. *Lessard*, 414 U.S. 473 (1974).

Therefore, IT IS ORDERED that the judgment of this court dated January 31, 1974, be and hereby is modified so that said judgment reads as follows:

> IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success.

Dated at Milwaukee, Wisconsin, this 24th day of July, 1974.

/s/ *F. Ryan Duffy*
F. Ryan Duffy, U.S. Circuit Judge

/s/ *John W. Reynolds*
John W. Reynolds, U.S. District Judge

/s/ *Myron L. Gordon*
Myron L. Gordon, U.S. District Judge



UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

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No. 73-C-360

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DUANE LARKIN, M.D.,

*vs.*

HAROLD WITHROW, D.O., et al.,

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**MODIFIED JUDGMENT**

This action came on for (hearing) before the Court, Honorable F. Ryan Duffy, Senior Circuit Judge, John W. Reynolds, Chief District Judge, and Myron L. Gordon, District Judge, United States Judges presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the preliminary injunction and judgment dated January 31, 1974, be and hereby is modified, pursuant to Rule 62(c), Federal Rules of Civil Procedure, so that said judgment reads as follows:

> IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on

the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success.

APPROVED:

*F. Ryan Duffy*
*John W. Reynolds*
*Myron L. Gordon*

Dated at Milwaukee, Wisconsin, this 25th day of July, 1974.

*Ruth W. LaFave*
Clerk of Court

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Respectfully submitted,

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Supreme Court, U. S.
FILED
SEP 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1573

HAROLD WITHROW, D.O., et al.,
*Appellants,*

*v.*

DUANE LARKIN, M.D.,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

## BRIEF IN OPPOSITION TO SUGGESTION OF MOOTNESS OR IN THE ALTERNATIVE MOTION TO RECONSIDER APPELLEE'S MOTION TO DISMISS OR AFFIRM

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1573

HAROLD WITHROW, D.O., et al.,
*Appellants,*

*v.*

DUANE LARKIN, M.D.,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

## BRIEF IN OPPOSITION TO SUGGESTION OF MOOTNESS OR IN THE ALTERNATIVE MOTION TO RECONSIDER APPELLEE'S MOTION TO DISMISS OR AFFIRM

The appellee has filed with this Court a printed Suggestion Of Mootness Or In The Alternative Motion To Reconsider Appellee's Motion To Dismiss Or Affirm. This motion is based on the fact that the three-judge district court, on July 25, 1974, modified its judgment, which now reads:

> "IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer irreparable injury if said

statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success." (Suggestion of Mootness pp. 21, 22.)

The judgment of December 21, 1973, from which this appeal is taken, reads:

"It is Ordered and Adjudged that §448.18 (7), Wis. Stats., is unconstitutional and that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats." (Juris. State. App. p. 5.)

The appeal herein raises three questions. These questions are:

I. Can a district court in granting a mere motion for a preliminary injunction declare a state statute unconstitutional and preliminarily enjoin all utilization of the state statute?

II. Is the *per se* possession and exercise by an administrative agency of both statutory powers to investigate and to adjudicate a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

III. Under the circumstances of this case, did the district court have any discretion to grant a motion for a preliminary injunction and, if so, did such action constitute an abuse of discretion?

## THIS APPEAL IS NOT MOOT AND THERE IS NO REASON TO RECONSIDER THE APPELLEE'S MOTION TO DISMISS OR AFFIRM.

An appeal is moot and this Court loses jurisdiction of it when an event occurs which terminates the controversy



between the parties.[1] The modified judgment herein in no way terminates the controversy between the parties in the present appeal. The appellants are still and improperly preliminarily enjoined from utilizing the provisions of sec. 448.18 (7), Wis. Stats., and it is still the erroneous decision of the lower court that sec. 448.18 (7), Wis. Stats., is "unconstitutional and unenforceable" because "for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process" (Juris. State. App. p. 3). Questions II and III stated above are clearly not made moot by the modified judgment herein.

Question I, however, is arguably moot. The modified judgment herein, which is capable of being again modified back to the same erroneous content as found in the judgment appealed from, reveals an acknowledgment by the lower court that the prior judgment contained reversal error in that it improperly, in granting a mere motion for a preliminary injunction, declared a state statute unconstitutional and preliminarily enjoined all utilization of it. The modified judgment, however, does not actually make Question I moot, since it falls within the recognized exception that a question is not moot if it is "capable of repetition, yet evading review."[2]

Question I is very "capable of repetition, yet evading review." This is so because the appellee still possesses

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1. See such cases as *DeFunis v. Odegaard* (1974), — U.S. —, 94 S. Ct. 1704, 40 L.Ed. 2d 164; *North Carolina v. Rice* (1971), 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed. 2d 413; and *Liner v. Jafco, Inc.* (1964), 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed. 2d 347.

2. *DeFunis v. Odegaard* (1974), — U.S. —, 94 S.Ct. 1704, 1707, 40 L.Ed. 2d 164; *Roe v. Wade* (1973), 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed. 2d 147; *Southern Pacific Terminal Co. v. ICC* (1911), 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310.

a license to practice medicine in Wisconsin; the appellants still have the statutory power and duty to investigate practices inimical to public health by its licensees; the appellants still have the statutory power and duty to temporarily suspend licenses of licensees engaged in immoral or unprofessional conduct; and the district court is still convinced that it is a violation of due process for a state administrative agency to possess and exercise both investigative and adjudicative powers and functions.

This appeal is not moot and there is no reason for this Court to reconsider its denial of the appellee's motion to dismiss or affirm, since the serious and important questions presented by this appeal still exist and still require resolution by this Court. It should be pointed out, however, that if this appeal is considered to be moot, which it is not, this Court, as is customary, should vacate the judgment of the lower court and remand the case with directions to dismiss the action. As stated in *Duke Power Co. v. Greenwood County* (1936), 299 U.S. 259, 267, 57 S.Ct. 202, 81 L.Ed. 178:

> "* * * Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss. See United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U.S. 466, 475, 478, 60 L.ed. 387, 391, 392, 36 S.Ct. 212; Atherton Mills v. Johnston, 259 U.S. 13, 16, 66 L.ed. 814, 816, 42 S.Ct. 422; Brownlow v. Schwartz, 261 U.S. 216, 218, 67 L.ed. 620, 622, 43 S.Ct. 263; United States v. Anchor Coal Co. 279 U.S. 812, 73 L.ed. 971, 49 S.Ct. 262. * * *"

See also, *United States v. Munsingwear, Inc.* (1950), 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36, and *Brotherhood of Locomotive Firemen v. Toledo, P. & W. RR.* (1947), 332 U.S. 748, 68 S.Ct. 53, 92 L.Ed. 335, to the same effect.



## CONCLUSION

It is, therefore, respectfully submitted that there is no merit to the Suggestion of Mootness and that there is no reason to Reconsider Appellee's Motion to Dismiss or Affirm. If, however, this Court believes that the appeal is moot, it should vacate the judgment of the lower court and remand the case with instructions to dismiss.

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